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No. 85-

IN THE SUPREME COURT OF THE UNITED STATES

April Term 1985

THE TIMBERLANE LUMBER COMPANY, DANLI INDUSTRIAL, S.A., MAYA LUMBER COMPANY, S. de R.L., JORGE LIMA, MIGUEL ARDON, and GORDON SLOAN SMITH,
Petitioners,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, BANKAMERICA CORPORATION, PEDRO CASANOVA E HIJOS, S.A., IMPORTADORE MAYORISTA, S. de R.L., MICHEL CASANOVA, NASSER BONHEUR, MANUEL RUIS, LUIS PASMINO, HENRY MALATESTA, JOSE GONZALES, and PATRICK BYRNE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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270 pp

QUESTIONS PRESENTED

1. How should the serious conflict among the Circuit Courts of Appeals on the question of extraterritorial jurisdiction and comity be resolved?

2. Should the courts endorse a departure from the traditional rule requiring compliance with United States laws by United States multinational corporations where the action affects the foreign commerce of the United States?

3. Should the United States courts be granted unbridled discretion in deciding whether to abstain from exercising jurisdiction over an antitrust violation which substantially affects the foreign commerce of the United States?

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Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE PARTIES

Petitioner Timberlane Lumber Company ("Timberlane") is an Oregon partnership with its principal place of business in Eugene, Oregon. Timberlane was in the business of purchasing lumber from various mills and wholesaling it to dealers across the United States. Petitioner Danli Industrial, S.A. ("Danli") is an Honduran subsidiary of Timberlane formed in 1971 to acquire Honduran timber and operate a mill sixty miles from the Honduran capitol of Tegucigalpa. Petitioner Maya Lumber Company S. de R.L. ("Maya") was another Honduran subsidiary of Timberlane formed in 1971 to operate a sawmill in Tegucigalpa. Petitioner Gordon Sloan Smith is a Canadian national employed by Timberlane to manage the Maya operation. Petitioner Jorge Lima is a

Cuban emigre to Honduras who was employed by Maya.

Respondent Bank of America National Trust and Savings Association ("Bank of America") is a national banking association chartered under the laws of the United States, with its principal office in San Francisco, California, and conducts its banking business throughout the world including branch offices in Honduras. Respondent BankAmerica Corporation is a holding company for the Bank of America. Respondents Jose Gonzales, Henry Malatesta, Luis Pazimo, and Manuel Ruiz are citizens of the United States and employees of the Bank of America. Respondent Laureano F. Gutierrez is an Honduran lawyer for the Bank of America. Other named defendants were not served.

OPINIONS BELOW

In the present case four actions arising from the same series of events are consolidated. The Timberlane action was filed on May 14, 1973 by Timberlane, Maya, and Danli for damages and injunctive relief under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. By amendment, on June 6, 1973, Laureano Gutierrez was added as an additional defendant and an additional claim was asserted under the Wilson Tariff Act, 15 U.S.C. § 8. The Smith, Lima, and Ardon actions were commenced on February 4, 1974, alleging common law tort claims and diversity jurisdiction.

The defendants moved to dismiss the actions and on March 20, 1974 the District Court dismissed the Timberlane action in a brief unreported Order giving as its reason "that it is prohibited

under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce." The consolidated tort actions were dismissed under the doctrine of forum non conveniens.

The Petitioners appealed to the Court of Appeals for the Ninth Circuit which reversed the dismissal on the act of state doctrine, established a tripartite test for determining the extent of federal jurisdiction in cases alleging illegal antitrust behavior abroad, and vacated the dismissals and remanded the case for additional discovery in light of the new jurisdictional "rule of reason". Timberlane Lumber Co. v. Bank of America N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) ("Timberlane I").

On remand, the District Court allowed some additional discovery and then granted the Bank of America's motion to dismiss the antitrust action for lack of subject matter jurisdiction as a matter of international comity and fairness. Timberlane Lumber Co. v. Bank of America National Trust and Savings Association, 574 F. Supp 1453 (N.D. Cal. 1983) ("Timberlane II"). The consolidated tort actions were again dismissed on the grounds of forum non conveniens.

The Petitioners again appealed to the Court of Appeals for the Ninth Circuit which affirmed the dismissal because the interests of, and links to, the United States were not sufficiently strong, vis-a-vis Honduras, to justify an assertion of extraterritorial authority. Timberlane Lumber Company v.

Bank of America National Trust and Savings Association, ___ F.2d ___ (9th Cir. 1984) ("Timberlane III").

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1984. A Petition for Rehearing was timely filed on January 10, 1985. The Petition for Rehearing was denied on February 7, 1985. This Petition for Writ of Certiorari is being timely filed within 90 days thereafter. 28 U.S.C. § 2101(c); Supreme Court Rules 20.2, 20.4. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the antitrust laws of the United States as codified in Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and the Wilson

Tariff Act, 15 U.S.C. § 8 each of which are printed in full in Appendix E ("App. E").

STATEMENT OF THE CASE

The Petitioners allege that officials of the Bank of America and others located in the United States, Honduras, and other Latin American cities conspired to prevent Timberlane, through its Honduras subsidiaries, from milling lumber in Honduras and importing it into the United States to maintain control of the Honduran export lumber business in the hands of a few select individuals financed and controlled by the Bank of America. The purpose and effect of this conspiracy was to restrain the foreign commerce of the United States.

The victimization of petitioners by this conspiracy began when they attempted to reestablish a lumber mill near the

Honduran capitol of Tegucigalpa which had been built by the Lima family who had immigrated to Honduras from Cuba. Unknown to petitioners, the Lima company (Lima y hijos or Lima & Sons) had been destroyed by the same conspiracy because of the competition Lima had created with another lumber company, which lumber company had previously enjoyed a virtual monopoly over the export of Honduran lumber. This same company (Lamas) was a guarantor of a large Bank of America loans to Mastre Construction.

In the fall of 1971, Timberlane was constructing a sawmill near Danli and building a forest plantation. Timberlane retained Smith, who had considerable business experience in Central America to help resolve some problems Timberlane was having. While in Honduras, Smith paid a social call on the Lima family. In the

course of this visit he learned about the recent closure of the Limas' various mills in Honduras by the Bank of America. He was told that after the closure, the new mill near Tegucigalpa had been adjudicated to the Workers Union in satisfaction of worker wages and severance claims and that on November 19, 1971:

> "Mr. Nasser Bonheur, Manager of the Bank, states that the Bank has no interest whatsoever in buying the equipment and that the Union can take any action it considers will be best for it." (CR:385).

When Smith reported this to Timberlane, they decided to explore the matter further and after consulting with Honduran attorneys regarding the Union's title formed Maya Lumber Company who purchased the sawmill equipment from the Workers Union for $165,000.

Smith was also told that there was a substantial amount of other equipment in addition to equipment which Maya purchased from the Workers Union which had been virtually abandoned by the Bank of America. He met with the Manager of the Bank of America branch in Tegucigalpa to attempt to purchase the additional equipment. Bank Manager Bonheur rebuffed Smith's offers and instead sent a telegram to his superior at the Bank of America office in Guatemala City, Mr. Luis Pazmino, saying:

> "FURTHER OUR TELEPHONE CONVERSATION OF TODAY THIS IS TO INFORM YOU THAT THE BRANCH HAS BEEN OFFERED THE SUM OF $60,000 FOR ITS FIRST MORTGAGE . . . WE RECOMMEND THAT FAVORABLE CONSIDERATION BE GIVEN TO THIS OFFER . . . WHILE WE ARE STATING THAT OUR MORTGAGE IS OF QUESTIONABLE VALUE THE PROSPECT BUYERS ARE ALSO OF THE SAME THOUGHT BUT SINCE THEY ARE IN THE LUMBER BUSINESS THEY FEEL THAT WITH A WEAPON SUCH AS A FIRST MORTGAGE

> THEY COULD TAME THEIR NEW COMPETITOR. THEREFORE THEY CONSIDER THE $60,000 AS AN INVESTMENT WHICH WILL NOT BE READILY RECUPERATED BUT SERVE AS AN INSURANCE PREMIUM." (CR:385, emphasis supplied).

Ignorant of these schemes to tame Maya, Smith continued his efforts to purchase the remaining equipment by going to San Francisco, California to discuss the matter with Vice President Henry Malatesta. On March 3, 1972, Mr. Malatesta telegraphed Mr. Pazmino about his meeting with Mr. Smith and Smith's interest in the remaining Lima equipment.

Fearing both that the Maya mill would be reactivated, and that their carefully stitched plans to destroy the Maya mill and to protect the Lamas/Mestre loans were unravelling, Pazmino went to San Francisco and then directly to Honduras from the United States, arriving in

Honduras on March 6, 1972. (CR:385, PX 75).

On the next day March 7, 1972, Pazmino, Ruiz and Bank of America attorney Gutierrez, the latter also Timberlane's counsel (CR:382, Robbins Aff., Excerpts at 588-593), met and concocted a plan to destroy both the Maya plant, and the competition it posed. Rather than sell the remaining assets to Smith, the Bank of America seized on a legal technicality to attack Maya's purchase of the equipment from labor by taking the position that:

> "The lawyer that represented the Limas did not have the power to deliver the assets of the company to the workers. Therefore the adjudication is null -- and the assets are not Sloan Smith's." (CR:385, PX 76).

On March 9, 1972, Ruiz wrote the following memo:

"SUBJECT: Lima Case

Separate meetings took place in an effort to finalize the course of action to be taken in the Lima Case.

[allegedly privileged material deleted]

. . .

2. The second meeting was with Mr. Jose Caminals, a lumber man who operates a saw mill . . .

The discussion brought to light the fact that there is no love lost between Caminals and the Limas, and that the relationship between Caminals and Sloan Smith is only of a superficial nature. Mr. Caminals appears to be acquanted [sic] with the tactics and methods used by the Limas in disposing of the missing equipment and claims that he can locate, and secure a good portion of it by using any method which may be called for under the circumstances. The general impression that Mr.

Caminals gave was that he is a man of action and is up to the job of recuperating a good portion of the missing equipment.

3. A final meeting was held with Mr. Bernard Casanova and Jose Caminals. A final agreement was reached whereby the Bank will sell the mortgage to Casanova e Hijos, and Casanova e Hijos will, in turn, sell it to Caminals. The agreement on the percentage recoveries is as follows:

a. Up to L.500,000

Casanova	10%
Caminals, Perez & Lawyer	30%
Bank of America	60%
	100%

b) For excess of L.500,000

Casanova	10%
Bank of America	20%
Caminals et al	70%
	100%

All expenses for account of Caminals." (CR:385, PX 77; emphasis supplied).

No one informed Smith or Timberlane of this clandestine arrangement. Rather, the Bank of America continued to represent, falsely, that it was trying to locate the assets to sell to Timberlane. (CR:382, Smith Aff., Excerpts at 663).

Meanwhile, the Mestre road-building loan which the Lamas had guaranteed to the Bank of America was going from bad to worse. (CR:385, PX 70, 81). Increasingly, the Bank of America was looking to Lamas as the guarantor on Mestre's loan. While in Honduras to ensure that the Limas' mill not be reactivated under the new Maya ownership, Pazmino wrote Malatesta on March 6, 1972 about Lamas' success absent Lima competition:

"Dear Hank:

Upon arriving in Tegucigalpa today I have been given the new Financial

> Statement of Jose Lamas as of December 31, 1971. As you can see, this Financial Statement shows a substantial improvement from the previous year, and therefore, his position as guarantor on the Mestre problem is being likewise improved.
>
> I am rushing to send you a copy of this statement since I know it will be of value when discussing our Mestre and Lamas relationship with the National Bank Examiners." (CR:385, PX 79).

With such good news, the scheme to keep the Maya mill closed progressed. Thus, attorney Gutierrez prepared a document on April 17, 1972 transferring the Bank's mortgage to Casanova. Casanova was to notify the Bank of America at least once a month of his efforts. (CR:385, PX 82). On April 18, 1972, Ruiz wrote Casanova that he could reassign the mortgage to Caminals. On the same day, this transaction occurred, with the Bank of America to receive 56% of any

proceeds. (CR:385, PX 83, 84, 94, 95). Simultaneously on April 18, 1972, Caminals transferred to the Bank of America all of his worldly assets, including his sawmill equipment, timber rights, and, last but not least, his 23-inch Zenith television set, radio and record player console, his store, and his "Sears brand cold spot yellow refrigerator". (CR:385, PX 85). Why this unusual transfer? PX 85 provided that if the Bank of America branch manager in San Jose, Costa Rica sent a letter confirming that Caminals had fulfilled his contractual obligations to Casanova, the Bank of America would return Caminals' worldly possessions. (Id.). Thus, the "man of action" became the Bank of America's puppet, ensuring his use of "any method which may be called for under the circumstances."

That these clandestine plans were supervised by Pazmino is demonstrated by his presence in Tegucigalpa on April 6, 7, 20 and 21, 1972. (CR:385, PX 80, 86).

On June 16, 1972, the conspirators struck, not by collecting the unclaimed Lima assets, but by arriving at the Maya mill with 25 armed men to disrupt production and stop lumber and log shipments out of and into the Maya plant. (CR:382, Smith Aff., Excerpts at 664). However, Caminals sought no judicial order for his embargo until the next day, (CR:385, PX 87), and the First Civil Court did not notify Maya of the embargo until July 6, 1972. (CR:385, PX 88).

On July 8, 1972, Caminals also embargoed Danli even though Danli had nothing to do with the Limas' mortgage. (CR:385, PX 90). Unaware of Gutierrez's involvement with the Bank of America

plot, Timberlane retained him to attempt to lift Caminals' embargo. (CR:385, PX 91, 92).

Smith met with the Bank of America on July 24, 1972 to ask for restraint. According to banker Ruiz's memo to San Francisco:

> "Certain arguments were given in support of their contention that the adjudication of the machinery of Lima e Hijos to the workers was valid. They said the whole attack by Caminals and his friends was vicious and unlawful. They asked BOA not to be associated with such a 'shady' group and to pressure the Casanovas and Caminals into making this a clean legal fight by withholding credit from them or forcing them to pay what they owe us if necessary. They ended up by saying that the bank was being held responsible for all their troubles since Caminals is in reality a tool of the Bank, and if we did not help to make the fight a clean one, they would find a way to sue the Bank for damages. On this <u>friendly</u> note, the meeting ended.

The following morning we had an informal visit with the U.S. Ambassador who had been brought into the picture by Mr. Sloan Smith. Mr. Smith had requested the assistance of the U.S. Ambassador in what was described as an unwarranted attack against american [sic] interests (investments) since the major portion of the capital of the Maya Lumber Co., was supposedly American. The Ambassador said that he was informed the Honduran Army personnel had taken part in the occupation/embargo of the Maya Lumber Company premises which he deplored since this happens to be a civil case where only the civil authorities should be involved. He also said that he had heard that Mr. Caminals was using dubious methods in his fight including bribing judges. He said that he had placed a complaint with the Honduran Government against the use of army troops and that the authorities have desisted from continuing doing so.

We explained to the Ambassador the Bank's position, that we sold our rights [emphasis supplied] to the Casanovas who in turn, sold theirs to Caminals and that we had no direct involvement, also that the Bank's interest was limited to receiving a percentage of

> whatever is recovered by the Casanovas as payment for the sale of our loan/mortgage. The meeting ended cordially." (CR:385, PX 93) (emphasis in original unless otherwise indicated).

Two days after Ruiz told the U.S. Ambassador the Bank of America had no responsibility or control, an article appeared in El Chronista attacking Smith and Maya. (CR:385, PX 99). Also on July 27, 1972, Caminals paid $2,475 to Mr. Medrano, an El Chronista reporter, for this article, (CR:385, PX 100), and a $2,500 deposit, and a $2,475 withdrawal were made in Caminals' Bank of America account. (CR:386, PX 101). The $2,500 deposit came from Casanova on the Bank of America line of credit established to pay Caminals. (CR:386, PX 102, CR:151, at 61-73, 76-99).

E. H. Robbins ("Robbins"), general manager of Timberlane, attempted to

resolve the problem by meeting with Malatesta in San Francisco. (CR:382, Robbins Aff., Excerpts at 594-600). On July 26 and 31, 1972, Malatesta asserted that the Bank of America had no knowledge of what was happening to Maya and Danli in Honduras, had no interest in the note held by Caminals, and had no desire to discuss the situation further. (Id.; CR:385, PX 97).

Byrne, another Bank of America official, and Ruiz discussed details of the conspiracy by telephone. This conversation was tape-recorded by someone unconnected with Timberlane, and a copy of the tape was given to a reporter in Honduras who played it for Smith. (CR:385, PX 97). When confronted by Smith, Byrne admitted that the Bank of America had organized, directed, financed, and would benefit from the litigation initiated by

Caminals against Timberlane. Byrne also informed Smith of Bonheur's and Lamas' connivance, who, according to Byrne, had "made a bundle" on the demise of Lima e Hijos. (CR:385, PX 98).

Bank of America officials in San Francisco, not in the least chagrined by the discovery of their activities, proceeded to phase two of their plan. The Bank of America ensured that Timberlane could not sell its interest to another, possibly more powerful, lumber concern, and encouraged Timberlane's customers to back out of their commitments. Success in this portion of the plan required action directed from San Francisco.

Robbins had negotiated a contract with William R. Delph, president of Imperial Lumber Company, an American company in Florida, whereby Imperial agreed to distribute lumber shipped by

Timberlane to Tampa, Florida, from its Honduras subsidiaries. (CR:383, Robbins Aff., Excerpts at 622-623).

Sales by Timberlane to Imperial were initially prevented by the June 16, 1972 embargo against Maya and Danli. However, unknown to Timberlane, Byrne told Delph sometime in mid-1972 that:

> "if Imperial should buy lumber from the Maya plant, [Imperial] must buy it from Mr. Caminals . . . [and] that Mr. Caminals had control of the wood and machinery, and any lumber that left the Maya plant must do so with Mr. Caminals' permissions." (CR:383, Delph Aff., Excerpts at 561-562).

On both August 4 and September 14, 1972, Robbins telephoned Malatesta to request a meeting to rectify the Maya and Danli situation, only to be rebuffed with the cliche that the note and mortgage had been sold. (CR:382, Robbins. Aff., Excerpts at 600, CR: 386, PX 103, 104).

Caminals again shut Maya down on October 21, 1972, this time with armed troops. That intervention was later overturned in Honduras' courts, but the damage was irreparable: records and equipment were destroyed or stolen, and employees were assaulted and jailed. (CR:382, Smith Aff., Excerpts at 667-672, CR:386, PX 105). Although a Honduras court ordered the stolen records returned, this was not done, and many later surfaced in the hands of the Bank of America in San Francisco. 1/

1/ The events of October 21, 1972 are representative of what the district court characterized as "the greater experience and defter hand a multinational bank wielded in a small, strife-torn Central American state", 574 F.Supp. at 1459.

Jorge Lima arrived at the Maya plant at 5:45 a.m. He noticed the place was full of CES from the "Rural Unit", which is the toughest unit of the CES, each

[Footnote Continued On Next Page]

In early November, 1972, Smith,

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armed with Girande rifles, sides arms, and sheath knives. Lima got the mill started at 6:00 a.m. and went to his office. At 7:00 a.m. while sitting at his desk, Lima saw the Bank of America's interventor arrive and talk to the foreman and several men. Thereupon, the foreman and Diaz entered the office, and the foremen told Lima that Diaz had ordered him to stop the mill because it was a holiday. Lima replied to Diaz that he would not stop the mill, they were paying holiday overtime wages and only Smith could order the mill stopped.

At that time the phone rang and Diaz, armed with a pistol, stopped Lima from answering it. He then told the sergeant to bring a soldier inside, watch Lima and see that he didn't get up or touch any papers. Diaz then told the CES to remove all the workers from the plant even if force had to be used.

While the plant was being cleared Lima sat at his desk with a rifle pointed at him.

At 8:00 a.m. Sloan Smith arrived with his attorney and an office worker named Roaky. Diaz then said to the CES sergeant "Don't let the Gringo in the office". When they tried to enter Roaky said, "Let Mr. Smith in, he was the manager". Diaz, the sergeant, and the Bank of America's depositor grabbed Roaky and threw him out the door. In the

[Footnote Continued On Next Page]

Robbins and Caminals' lawyer attempted to meet. On November 7, 1972, Ruiz wrote Pazmino, copying Malatesta:

> "On Friday, November 3rd, Mr. Robbins arrived in Honduras. On Saturday, Mr. Sloan Smith called Mr. Caminals' lawyer, telling him that he would like to sit down with Mr. Robbins and the bank to see if a satisfactory solution in this case can be reached. He stated that Mr. Smith had said that they do not want to be put in a position of dealing directly with the 'picaros' [rogues], Jose Caminals and the Casanovas, and that any negotiations that take place should be directly between banks, their bank in the U.S. and Bank of America.
>
> Of course, this kind of arrangement has the danger that the part the bank plays in this

---

process Diaz repeatedly hit him with his fist and he was rifle-butted.

When Lima attempted to help Roaky, Diaz, the depositor, and the sergeant jumped him, with guns drawn, threw him out the door and hit him in the back with a rifle butt. They were then locked up in jail until Smith secured their release. (CR:386, PX 105).

> matter, could be interpreted as being more than a passive role. On the other hand, if Mr. Smith and Mr. Robbins' intentions are honorable and they really want to arrive at a satisfactory solution by paying the right price, then we don't see any objection for the bank to act as an agent for Mr. Caminals [sic] in arriving at a final solution." (CR:386, PX 112).

This letter was received by Malatesta on November 15, 1972 and two days later Ruiz noted:

> "Malatesta and MLO [Bank of America counsel Michael L. Owens] called Ruiz to advise:
>
> a. Under no circumstances and in no capacity is BOA to negotiate.
>
> b. Keep lawyer Gutierrez fully informed." (CR:386, PX 112).

At this time, Timberlane decided to get out of Honduras either by a sale or merger of its Honduras companies with a larger company better able to cope with problems fomented by the Bank of

America. Therefore, Timberlane's partners and Smith proceeded to contact prospective purchasers. Imperial Lumber Company and its parent company Deltona Corporation, of Miami, Florida had expressed a keen interest in purchasing the operations. Smith handled those negotiations in Florida and Honduras.

With remarkable presience, Jose Gonzalez ("Gonzalez"), another Honduran Bank of America employee, wrote Pazmino on January 30, 1973:

> "This very minute things are back again in the boiling stage as I was informed just minutes ago that Mr. Smith, after learning of the Court of Appeals decision, started to take out whatever machinery he could withdraw from the premises and, consequently, provoked a criminal action against him which, I understand, was going to be enforced this morning, resulting in Mr. Smith been [sic] placed under the custody of DIN (Departamento de Investigacion Nacional) where he most likely

will not see the sun for a number of days." (CR:386, PX 113) (emphasis supplied).

The same day on January 30, 1973, at 6:15 p.m., the DIN arrested Smith at the parking lot of the Maya Hotel, roughed him up, and threw him into jail. Also jailed on that date were Jorge Lima and Miguel Ardon. (CR: 382, Smith Aff., Excerpts at 670-672; CR: 386, PX 114).

At the time of his arrest, Smith was completing a sale of Timberlane's Honduran operations to Deltona. Smith's meetings with Deltona's officials in Tegucigalpa were interrupted upon his arrest and jailing. This so terrified the Deltona officials that further negotiations were cancelled. (CR:383, Powell Aff., Excerpts at 576; Delph Aff., Excerpts at 562-563).

The viciousness of the physical attacks were emphasized in a series of

press attacks -- again paid for by the Bank of America's puppet, Caminals, with Bank of America funds. (See e.g., CR:386, PX 116; CR: 382, Guardiola Aff., Excerpts at 564-572).

Timberlane repeatedly attempted to discuss these matters with Bank of America officials and repeatedly pleaded with the Bank of America to resolve ownership of the Lima equipment in a civilized manner without physical violence and media publicity. On each occasion Timberlane was falsely informed that the mortgage had been sold, and that the Bank of America had no control over Casanova and Caminals. It should be noted that at no time did Timberlane ask for money damages or ask for the Bank of America to give up its right to a final adjudication of title to Labor's assets. (CR:383, Robbins Aff., Excerpts

at 644). As a last resort, Timberlane filed the present action on May 14, 1973.

ARGUMENT

This Court is respectfully asked to issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit to review its decision in this case for the following reasons:

(a) The Opinion of the Court of Appeals for the Ninth Circuit clearly conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

(b) The Opinion of the Court of Appeals for the Ninth Circuit is a substantial departure from the traditional rule as established by this Court, and the other Circuit

Courts of Appeals, requiring compliance with the laws of the United States by multinational corporations where their action substantially affects the foreign commerce of the United States.

(c) The Opinion of the Court of Appeals for the Ninth Circuit grants unbridled discretion to the district courts in deciding whether to abstain from exercising jurisdiction over an antitrust violation which substantially affects the foreign commerce of the United States.

I.

The Opinion Of The Court Of Appeals Is In Clear Conflict With The Opinion Of The Court Of Appeals For the District Of Columbia Circuit In The Laker Airlines Case

In the 1976 Opinion of the Court of Appeals for the Ninth Circuit (Timberlane

I), the court established a rule requiring the district courts to consider whether as a matter of "international comity and fairness" jurisdiction should be asserted over an antitrust controversy which substantially affects the foreign commerce of the United States. This decision has been in the forefront of a lengthy debate over the proper application of United States antitrust law to extraterritorial conduct. 2/

2/ The magnitude of this debate is illlustrated by the numerous cases and articles discussing Timberlane I, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979); Industrial Inv. Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S.Ct. 1244, 704 F.2d 785 (5th Cir. 1983); Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). See, e.g., Swan, International Antitrust: The Reach and Efficacy of United States Law, 63 Ore L. Rev. 177, 196-216 (1984); Craig, Extraterritorial

[Footnote Continued On Next Page]

Following remand, the District Court struggled with the issue for seven years and finally declined to exercise

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Application of the Sherman Act: The Search for a Jurisdictional Standard, 7 Suff. J. Transn'l L. 295 (1983); Grippando, Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine, 23 Va. J. Int'l L. 395 (1983); Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579 (1983); Shenefield, Thoughts on Extraterritorial Application of the United States Antitrust Laws, 52 Fordham L. Rev. 351 (1983); Kadish, Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena, 4 Nw. J. Int'l L. & Bus. 130 (1982); Lowenfeld, Antitrust, Interest Analysis, and the New Conflict of Laws, 95 Harv. L. Rev. 1976 (1982) (reviewing J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d ed. 1981)); Davidow, Extraterritorial Antitrust and the Concept of Comity, 15 J. of World Trade L. 500 (1981); Marcuss & Richard, Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory, 20 Colum. J. Transn'l L. 439 (1981); and Rahl, International Application of American Antitrust Laws: Issues and Proposals, 2 Nw. J. Int'l L. & Bus. 336 (1980).

jurisdiction and dismissed the case (Timberlane II). On the second appeal, the Court of Appeals for the Ninth Circuit issued its second opinion (Timberlane III) and affirmed the District Court's dismissal of the action while criticizing the District Court for failing to address directly the Timberlane I factors. However, the Court of Appeals undertook its own review of the record with regard to controverted factual issues regarding the factors of "internationl comity and fairness" and concluded that while the courts could exercise jurisdiction over the controversy, they "should" not do so.

In concluding that the courts "should" not exercise jurisdiction over the controversy based on its own comity and fairness analysis, the opinion of the Court of Appeals for the Ninth Circuit is

in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

In the Laker Airways case, KLM and Sabena advanced the "international comity and fairness" arguments of Timberlane I to argue that the district court (1) should reconcile the conflict between the United States and the United Kingdom by abandoning its claim to concurrent prescriptive jurisdiction, and (2) should not have issued an "antisuit injunction" prohibiting KLM and Sabena from joining a British action or from initiating any action on their own for similar relief anywhere else in the world.

When confronted with the Timberlane arguments, the Court of Appeals for the District of Columbia Circuit held that

"[a]bsent an explicit directive from congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction." 731 F.2d at 955.

The D.C. Circuit took the position that since Congress specifically authorized private treble damage actions by foreign corporations and since Laker's jurisdictional contacts were sufficient to permit the legitimate exercise of prescriptive jurisdiction under the Sherman Act, the issue was whether there existed any ground upon which it could decline jurisdiction. Relying on Timberlane, the defendants urged comity as such a ground and primarily on the conflict between United States and foreign law and policy. However, unlike the Court of

Appeals for the Ninth Circuit where the mere existence of an alleged conflict between foreign law and United States law was given almost conclusive effect 3/, the D.C. Circuit said that such heavy reliance on the conflict between U.S. and foreign law is inappropriate. As the Laker Airways court pointed out, such a "proclamation by judicial fiat that one interest is less 'important' than the other will not ease a real conflict," 731 F.2d at 949 and a United States court is "ill-equipped to 'balance the vital

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3/ The Ninth Circuit's determination that there was a conflict between Honduras law and United States antitrust law required the Ninth Circuit to resolve an issue that was hotly contested by the parties each of whom had submitted conflicting evidence. In fact, the authority relied upon the Ninth Circuit to find such a conflict was relied upon by the district court to find no such conflict. Compare Timberlane II, App. C, p. 82 n. 38 with Timberlane III, App. B, p. 25.

national interests of the United States and the [United Kingdom] to determine which interest predominates." 731 F.2d at 950.

This obvious conflict between the opinions of the Ninth Circuit and the D.C. Circuit as demonstrated by the D.C. Circuit's rejection of the Timberlane I test and the Ninth Circuit's reaffirmance of that test in Timberlane II without even mentioning the Laker Airways opinion makes this case perculiarly appropriate for Certiorari. At least two commentators have urged this Court to review and resolve this conflict. Sennet and Gavil, Extraterritorial Conduct Issue Ripe for Review, Legal Times, p. 17 (March 18, 1985) and another commentator has noted that the inconsistencies among the opinions of the various circuits on the question of comity and

extraterritorial antitrust jurisdiction makes this important issue uniquely appropriate for Supreme Court review. Davidow, Extraterritorial Antitrust and the Concept of Comity, 15 J. of World Trade L. 500, 507 (1981).

II.

The Timberlane Opinion Is A Substantial Departure From The Traditional Rule Of Extraterritorial Jurisdiction Where The Action Of Multinational Corporations Substantially Affects The Foreign Commerce Of The United States

Prior to the Timberlane opinions the traditional rule of extraterritorial jurisdiction was perhaps best set forth in Judge Learned Hand's oft-cited opinion in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945):

> "[I]t is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these

> liabilities other states will ordinarily recognize."

The Court of Appeals has rejected this traditional rule in favor of what it has called a "jurisdictional rule of reason."

> "What we prefer is an evaluation and balancing of the relevant considerations in each case - in the words of Kingman Brewster, a 'jurisdictional rule of reason.'
>
> * * *
>
> We conclude then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?"

The District of Columbia Circuit in its very able opinion in Laker Airways has seriously questioned the

appropriateness of such a departure from the traditional effects test in favor of the interest-balancing approach. The D.C. Circuit has questioned whether this approach would appreciably promote international comity while taking note of the increasing volume of criticism among courts and commentators directed at interest balancing.

Petitioners respectfully submit that it is now appropriate for this Court to consider the wisdom of the Ninth Circuit departure from prior precedents concerning the extraterritorial jurisdiction of the United States antitrust laws.

III.

The Opinion Of The Court Of Appeals For The Ninth Circuit Grants Unbridled Discretion To The District Courts In Deciding Whether To Abstain From Exercising Jurisdiction Over An Antitrust Violation Which Substantially Affects The Foreign Commerce Of The United States

As pointed out by the Opinion of the District of Columbia Circuit the approach of the Ninth Circuit in Timberlane giving such heavy reliance on a supposed conflict between United States and foreign law simply begs the question whether jurisdiction should be exercised. Nor does the Timberlane approach give any reason why such a conflict should automatically lead to abandonment of United States law in favor of foreign law. The Timberlane approach, as aptly illustrated by the Third Circuit decision in Mannington Mills, is one of unabashed abstention. As such it is completely

inappropriate for the federal courts. See, e.g., Grippando "Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine" 23 Va. J. Int'l L. 395 (1983).

The illogical inconsistency of such an approach is demonstrated when the facts and result in Timberlane are compared with the facts and result in Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982) 704 F.2d 785 (5th Cir. 1983). In both cases the plaintiff was an American company which was attempting to import timber or lumber products from a foreign country into the United States. However in Mitsui the plaintiff was completely unsuccessful and in Timberlane the plaintiff was able to import several shiploads

of lumber before being hit by the defendant's predatory acts. In Mitsui the defendants were Japanese nationals while in Timberlane the defendants were United States citizens. In Mitsui the principal acts occurred in Indonesia, while in Timberlane the principal acts occurred in Honduras under the direction of officers higher up in the corporate hierarchy in Guatamala City and San Francisco. In Timberlane the court found that the "enforcement of United States antitrust laws in this case would lead to a significant conflict with Honduran law and policy" while in Mitsui the court said that neither "the Indonesian court's nullification of [plaintiffs'] joint venture agreement with Telaga Mas nor the Indonesian government's action in cancelling its approval of [plaintiffs'] joint venture ... has been shown to have been

approval of defendants' efforts to destroy the joint venture agreement ...." 671 F.2d at 885. In Mitsui the court exercised jurisdiction over the dispute and in Timberlane the court abstained from exercising jurisdiction.

Such two inconsistent results illustrate the importance and necessity of this Court's granting of Certiorari to review the issue of extraterritorial jurisdiction and comity.

CONCLUSION

At the present time there is substantial debate and confusion regarding the scope of extraterritorial antitrust jurisdiction. In no small part this is the result of the various decisions in this case. As a result, we have a situation where in this case an American company is free to act in the most lawless manner with impunity and without

accountability. Yet, in other cases, foreign companies whose action, if anything, was less barbarous find themselves subject to the jurisdiction of the United States courts. If international comity is to have any meaning in the courts of the United States, it, at least, should mean that there are well defined jurisdictional rules which are consistently applied. Accordingly, Petitioners respectfully urge this Court to grant the Writ of Certiorari as prayed.

Dated: May 7, 1985

Respectfully submitted,

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Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMBERLANE LUMBER COMPANY, et al.,

Plaintiffs-Appellants,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, et al.,

Defendants-Appellees.

No. 83-2008

ORDER

Before: BROWNING, MERRILL, and SNEED, Circuit Judges.

Appellants' petition for rehearing is denied.

Filed: February 7, 1985

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMBERLANE LUMBER COMPANY, et al.,

Plaintiffs-Appellants,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, et al.,

Defendants-Appellees.

No. 83-2008
DC No. C-73-0792-SW

OPINION

Appeal from the
United States District Court
for the Northern District of California.

Spencer Williams, District Judge,
Presiding.

Argued and Submitted August 7, 1984.
Filed: December 27, 1984

Before: BROWNING, MERRILL, and

SNEED, Circuit Judges.

SNEED, Circuit Judge:

In this antitrust action, Timberlane Lumber Company (Timberlane) alleged that Bank of America, its officers, and other individuals conspired to prevent Timberlane from milling lumber in Honduras and exporting it to the United States. The suit was consolidated with three independent tort actions brought by Timberlane employees for individual injuries suffered during the alleged illegal conduct. The district court dismissed the antitrust action under the act of state doctrine and for lack of subject matter jurisdiction. The consolidated tort actions were dismissed under the doctrine of forum non conveniens.

This case has been before us previously. On that appeal, Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976)

(Timberlane I), we established a tripartite test for determining the extent of federal jurisdiction in cases alleging illegal antitrust behavior abroad. We then vacated the dismissals and remanded the case for additional discovery in light of the new jurisdictional "rule of reason." After allowing additional discovery, the district court granted Bank of America's motion to dismiss the antitrust action for lack of subject matter jurisdiction. Timberlane Lumber Co. v. Bank of America National Trust and Savings Association, 574 F.Supp. 1453 (N.D. Cal. 1983) (Timberlane II). The tort actions were again dismissed on forum non conveniens grounds. Timberlane appeals the dismissal in all respects. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

The complex facts of this case are set forth in Timberlane I, 549 F.2d at 603-05, and Timberlane II, 574 F.Supp. at 1455-59. Here we will only briefly outline the facts relevant on appeal.

Timberlane, an Oregon partnership whose primary business is the purchase and distribution of lumber in the United States, formed a partnership with two Honduran corporations (Danli Industrial, S.A. and Maya Lumber Company, S. de R.L.) that were incorporated and principally owned by the general partners of Timberlane. The partnership sought to develop alternative sources of lumber for delivery to the United States from Honduras. It eventually purchased an interest in an existing but financially

unstable lumber mill owned by the Lima family.

Before the Timberlane purchase, ownership of the Lima enterprise had been transferred to a group of Lima employees, Bank of America, and another competing lumber mill, Casanova. Timberlane purchased its interest from the Lima employees, who had priority over the other claims. The other two owners refused to sell their interests to Timberlane. Bank of America's actions in connection with these interests form the basis for the alleged illegal antitrust conduct.

Timberlane alleges that Bank of America refused to sell its share in the Lima enterprise because it wanted to protect its interests in other competing lumber mills by driving Timberlane out of the Honduran lumber market. Thus,

Timberlane claims that Bank of America transferred its mortgage to Casanova, a Lima enterprise competitor, for no consideration other than a portion of the proceeds collected. Casanova subsequently assigned both interests to Caminals who allegedly attempted to eliminate the Lima enterprise.

Using Honduran law, Caminals tried to foreclose on the mortgages by placing an "embargo" on all property owned by the Lima enterprise. A Honduran court appointed an "intervenor" to prevent a diminution of the Timberlane assets. Timberlane alleges that through the intervenor, Caminals obtained embargos against Timberlane's partners Maya and Danli. It also claims that Bank of America paid the intervenor to use guards and troops to shut down Timberlane's milling operation. It is in this context

that Timberlane's employees alleged that they were falsely arrested and imprisoned. Eventually, all of the claims relating to the mortgage foreclosure were resolved in the Honduran court system.

Timberlane filed this antitrust action seeking more than $5,000,000 in damages from Bank of America and its Honduran subsidiaries. Some of Timberlane's employees also brought individual tort actions. The district court, to repeat, dismissed (1) the antitrust action on the ground that the act of state doctrine prevented the federal courts from entertaining suit, and (2) the tort actions on the basis of forum non conveniens.

In Timberlane I, we vacated the district court's act of state holding and announced a tripartite test for

determining the extent of federal jurisdiction over claims alleging illegal antitrust behavior abroad. Because the case was remanded for additional discovery in light of the new "rule of reason" standard, we also vacated the forum non conveniens dismissal.

On remand, the district court allowed additional discovery. Bank of America again filed a motion to dismiss the action for lack of subject matter jurisdiction. The district court treated the motion as one filed under Federal Rule of Civil Procedure 12(b)(1) and dismissed the antitrust claim. It also again dismissed the tort claims on forum non conveniens grounds. Timberlane appeals the entirety of the district court's judgment.

II.

APPLICATION OF TIMBERLANE I'S JURISDICTIONAL RULE OF REASON

A. Dismissal Under Federal Rule of Civil Procedure 12(b)(1)

Before we review the district court's application of Timberlane I's jurisdictional rule of reason, we must first determine whether it was proper to dismiss the case for lack of subject matter jurisdiction under a Rule(b)(1) motion without affording Timberlane summary judgment treatment.

Bank of America filed a motion to dismiss the antitrust action for lack of subject matter jurisdiction, or, in the alternative, to grant summary judgment in its favor. The district court treated the motion as one filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure and dismissed the action for lack of jurisdiction. Timberlane

challenges this use of Rule 12(b)(1). It says that the question of jurisdiction is so closely intertwined with the merits of the case that the district court should have afforded its motion the summary judgment treatment associated with Rule 56. We disagree.

In Timberlane I, 549 F. 2d at 601-03, this court discussed the procedural posture of dismissals both on the basis of the act of state doctrine and for lack of subject matter jurisdiction. We said, "A motion to dismiss based on the act of state doctrine raises such a Rule 12(b)(6) objection, not a jurisdictional defect." Id. at 602. We acknowledged, however, that a motion to dismiss for lack of subject matter jurisdiction is properly treated as a Rule 12(b)(1) "speaking motion," and Rule 56 summary judgment treatment generally is not

required. Id. Nonetheless, we indicated that if the district court found subject matter jurisdiction lacking because of an insufficient relation to the foreign commerce of the United States, it should have afforded the motion Rule 56 treatment. "[I]t seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." Id. Timberlane relies on this language to support its contention that the district court could have dismissed the antitrust action only on a motion for

summary judgment. 1/ Although the issue

1/ Timberlane's argument mistakenly assumes that before the jurisdictional issue can be resolved, the district court must adjudicate the merits of its claim. Once a motion to dismiss is treated as one asking for summary judgment, it cannot be granted as long as genuine issues of material fact remain in dispute. In most cases this requires a complete trial to establish the facts on which the resolution of the merits of the case depends. This approach, however, would defeat the underlying purpose of Timberlane I's "rule of reason" analysis. By reaching the merits, federal courts would violate the principles of international comity embodied in the third part of Timberlane I's analysis. The test for jurisdiction would become a test of the merit of the allegations rather than the more flexible approach contemplated in Timberlane I. We do not believe that all cases deciding the question of extraterritorial jurisdiction should be decided under Rule 12(b)(1). But neither should district courts always reach the merits under Rule 56. The district court's articulation of a middle ground in this case is sound. One feature of this approach should be that the third part of the tripartite test should ordinarily be viewed as not involving the merits of the antitrust dispute.

[Footnote Continued On Next Page]

is a difficult one, we must disagree.

The basic principle is that Rule 56 treatment is required only when "the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits." Thornhill Publishing Co. v. General Telephone & Electronics Corp., 594 F.2d 730, 735 (9th Cir. 1979). Whether this "intermesh" exists must be determined by the district judge on a case by case basis. Thus, we must determine whether in this case "the

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Timberlane also argues that the district court failed to compel discovery concerning nonparties and impermissibly cut off all discovery efforts before completion. In light of our deferential standard of review of discovery orders, see Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984), and the district court's acceptance of proffered statements of proof, see Timberlane II, 574 F.Supp. at 1461, the district court's rulings regarding discovery are affirmed.

question of jurisdiction is dependent on the resolution of factual issues going to the merits." Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). See also 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 558 (1969).

Timberlane I's test undertakes three separate inquiries: (1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behavior; and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness. See Timberlane I, 549 F.2d at 613. Had the district court dismissed the case under either of the first two parts of the test, Timberlane would occupy much stronger ground in asserting that a

resolution of the merits was necessary to determine subject matter jurisdiction. A refusal to exercise jurisdiction under the third part of the test, however, need not directly implicate the merits of the case. It can involve a policy judgment that requires a consideration only of the facts as alleged. Thus, a Rule 12(b)(1) dismissal may be proper when the case is dismissed on the basis of the third part of Timberlane I's jurisdictional "rule of reason." See, e.g., Vespa of America Corp. v. Bajaj Auto Ltd., 550 F.Supp. 224 (N.D. Cal. 1982) (dismissing certain claims for lack of subject matter jurisdiction on the basis of the third part of Timberlane I's analysis.

This distinction was perceived by the district court when it stated: "Since we deem the undisputed material facts show extra-territorial application

of the antitrust laws inappropriate to this case, our ruling on defendants' motion for summary judgment does not reach the merits of plaintiffs' antitrust allegations." Timberlane II, 574 F.Supp. at 1460. To avoid the merits the district court accepted the plaintiffs' allegations as true. See id. at 1461 ("[W]e accept plaintiffs' allegations, as a proffer of proof in lieu of these witnesses' testimony."); id. at 1466 ("We take the plaintiffs' allegations of an anticompetitive effect in a relevant produce market as true, as if this were a Fed. R. Civ. Pro. 12(b)(6) motion.") See generally Note, Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context), 35 Hastings L.J. 115, 119 (1983). This afforded Timberlane the benefit of any doubt that may have existed concerning the substan-

tiality of the allegations relating to jurisdiction. 2/ We hold, therefore, that the district court properly analyzed Bank of America's motion under Rule 12(b)(1).

B. Timberlane I's "jurisdictional rule of reason."

In Timberlane I, 549 F.2d at 615, in describing our tripartite jurisdictional test, we said that the

> "problem [of extraterritorial jurisdiction] should be approached in three parts:

2/ "[W]e have applied a rigorous standard of proof to defendants' claims of plaintiffs' deficiencies of evidence on the Timberlane I tripartite test, and conclude that, on the issues material to that determination, there is neither material issue of fact to be culled from the submissions, nor is there inference or reference to such evidence favorable to plaintiffs which, even taken in the most favorable light to defeat dismissal, could support such a result."

Timberlane II, 574 F.Supp. at 1462 n. 24.

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extra-territorial jurisdiction of the United States be asserted to cover it?"

The district court applied Timberlane's analysis and, on the basis of its third part, concluded that jurisdiction should not be exercised in this case. Although we agree with the district court's conclusion regarding each part of the Timberlane I test, we do not expressly approve all of its analysis. Therefore, we discuss each part of the inquiry as set forth in Timberlane I. 3/

3/ The district court grouped Timberlane I's seven factors into three categories. Because this categorization does not sufficiently clarify the

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1. "Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?"

The first part of Timberlane I's analysis requires "that there be some effect - actual or intended - on American foreign commerce before the federal courts may legitimately exercise subject matter jurisidiction under [the anti-trust] statutes." 549 F.2d at 613 (emphasis in original). On appeal, Bank of America does not deny that Timberlane has met this requirement. "[B]y alleging the ability and willingness to supply cognizable markets with lumber that they allege would have been competitive with that already in the marketplace, they have satisfied this prong of the

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application of the seven factor analysis, we believe that district courts should continue to use the factors listed in Timberlane I.

Circuit's test." Timberlane II, 574 F.Supp. at 1466.

2. "Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?"

Under the second part of Timberlane I's analysis, "a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws." 549 F.2d at 613 (emphasis in original). Courts and commentators, however, have had difficulty identifying the nature and extent of proof required to satisfy this part of the inquiry. See, e.g., National Bank of Canada v. Interbank Card Association, 666 F.2d 6, 8 (2d Cir. 1981); 1 W. Fugate, Foreign Commerce and the Antitrust Laws § 2.15,

at 89-92 (3d ed. 1982). It has been suggested that Timberlane I requires a showing of "direct and substantial" effect on the foreign commerce of the United States. In fact, however, no such showing is necessary. The only issue under the second part of the inquiry is whether the magnitude of the effect identified in the first part of the test rises to the level of a civil antitrust violation, i.e., conduct that has a direct and substantial anticompetitive effect. See Timberlane I, 549 F.2d at 615 & n. 35. See also Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92, 102 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972); Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick. L. Rev. 187, 191 (1966). Timberlane I's

requirement that the allegation state a claim under the antitrust laws, however, "is a 'practical, case-by-case economic judgment,' not one based on 'abstract or mechanistic formulae,' ... and ... the barrier raised is not very high." Timberlane I, 549 F.2d at 615 n. 35 (citations omitted).

In this case Timberlane alleges that Bank of America conspired with its Honduran subsidiaries to prevent Timberlane from milling lumber in Honduras and exporting it to the United States. Our review of the complaint reveals that Timberlane has alleged an injury that would state a claim under the antitrust laws against Bank of America. Thus, it satisfies the second part of the analysis.

3. "As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?"

Under the third part of Timberlane I's analysis, the district court must determine "whether the interests of, and links to, the United States - including the magnitude of the effect on American foreign commerce - are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority." 549 F.2d at 613. This determination requires that a district court consider seven factors. The district court here found that the undisputed facts required that jurisdiction not be exercised in this case. We agree. To support our conclusion each factor will be examined.

a. "The degree of conflict with foreign law or policy"

We must determine whether the extra-territorial enforcement of United States antitrust laws creates an actual or potential conflict with the laws and policies of other nations. Timberlane argues that no conflict exists between United States and Honduran law. We disagree. The application of United States antitrust law in this case creates a potential conflict with the Honduran government's effort to foster a particular type of business climate.

Although Honduras does not have antitrust laws as such, it does have definite policies concerning the character of its commercial climate. To promote economic development and efficiency within its relatively undeveloped economy, the Honduran Constitution and

Commercial Code guarantee freedom of action. The Code specifically condemns any laws prohibiting agreements (even among competitors) to restrict or divide commercial activity. Under Honduran law, competitors may agree to allocate geographic or market territories, to restrict price or output, to cut off the source of raw materials, or to limit credit financing to obtain enterprises as long as the contracting parties are not de facto monopolists. See D. Ramirez, A Statement of the Laws of Honduras in Matters Affecting Business (1981). It appears that Honduran law intimately regulates private commercial activity in that country. Honduran law also promotes agreements that improve the competitive position of domestic industries in world markets by promoting efficiency and economies of scale.

On balance, we believe that the enforcement of United States antitrust laws in this case would lead to a significant conflict with Honduran law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction over this dispute.

b. "The nationality or allegiance of the parties and the locations of principal places of business of corporations"

Next we should consider the citizenship of the parties and witnesses involved in the alleged illegal conduct. In this case, with only one exception, all of the named parties are United States citizens or nationals. But it is also true that "[a]ll of the crucial percipient witnesses to the incidents were either Honduran citizens

or residents." Timberlane II, 574 F.Supp. at 1470. We believe, therefore, that the citizenship of the parties weighs slightly in favor of the exercise of jurisdiction.

c. "The extent to which enforcement by either state can be expected to achieve compliance"

The weighing of this factor yields no clear answer. Of course, any judgment against Bank of America could easily be enforced in a United States court. Whether such a judgment could be enforced as easily in Honduras is less certain. We believe that the enforcement factor tips slightly in favor of the assertion of jurisdiction in this case.

d. "The relative significance of effects on the United States as compared with those elsewhere"

A more definitive answer emerges when we compare the effect of the alleged illegal conduct on the foreign commerce

of the United States with its effect abroad. The insignificance of the effect on the foreign commerce of the United States when compared with the substantial effect in Honduras suggests federal jurisdiction should not be exercised.

A comparison of Honduran lumber imports to both United States imports and total United States lumber consumption is instructive. During the years 1970 through 1972, the amount of lumber imported from Honduras expressed as a percentage of total United States lumber imports was as follows:

YEAR	VOLUME (BOARD FT)	VALUE($)
1970	.07%	.09%
1971	.02%	.03%
1972	.04%	.05%

During the same years, Honduran lumber imports formed an even smaller percentage of total United States lumber consumption:

YEAR	VOLUME (BOARD FT)
1970	.011%
1971	.004%
1972	.008%

Clearly, Honduran imports have only a miniscule effect on United States lumber markets.

Second, a comparison of the specific submarkets of "Pine Lumber Dressed" and "Pine Lumber Rough" in no way helps Timberlane's case. Honduran imports of both "Pine Lumber" and "Pine Lumber NES Rough" expressed as a percentage of total pine lumber imports were as follows:

YEAR	VOLUME (BOARD FT)	VALUE($)
1970	3.0%	4.6%
1971	2.8%	3.2%
1972	3.4%	3.5%

Again, these figures represent only an insignificant part of the pine lumber import market. And although we do not have the relevant statistics, we believe that Honduran imports represent an insub-

stantial part of total United States pine lumber consumption.

The actual effect of Timberlane's potential operations on United States foreign commerce is, therefore, insubstantial, even in the narrow pine lumber market. In comparison, the effects of its activity on the considerably smaller Honduran lumber markets would have been much greater. The bank's actions also affect several other aspects of the Honduran economy such as the number of jobs, the amount of foreign exchange and taxes, and the internal competitive market. We believe that the relative significance of effects in this case weighs strongly against the exercise of jurisdiction.

e. "The extent to which there is explicit purpose to harm or affect American commerce"

We should also consider whether the defendant's actions were intended to harm

or affect the commerce of the United States. Our review of the record reveals that Bank of America's acts were directed primarily toward securing a greater return on its investment. Its actions were consistent with Honduran customs and practices. Timberlane has not demonstrated that Bank of America had any particular interest in affecting United States commerce.

f. "The foreseeability of such effect"

A court should also consider whether, at the time of the alleged illegal behavior, the defendant should have foreseen an effect on the foreign commerce of the United States. Aside from the fact that American commerce has not been substantially affected, Timberlane has not shown that Bank of America should have foreseen the consequences of

its actions. Bank of America simply enforced its mortgage in an attempt to recoup its investment. The effects of this action were merely part of the inevitable consequences that flow from attempting to salvage something from a failing business enterprise. We do not believe that a reasonable investor would have foreseen the minimal effect that has occurred here. This weighs against the exercise of jurisdiction.

g. "The relative importance to the violations charged of conduct within the United States as compared with conduct abroad"

Finally, a court should consider the location of the alleged illegal conduct in order to assess the appropriateness of the exercise of extraterritorial jurisdiction. In this case both parties agree that virtually all of the illegal activity occurred in Honduras. This

factor clearly weighs against the exercise of jurisdiction.

h. Resolving the Seven Factor Test

It follows that all but two of the factors in Timberlane I's comity analysis indicate that we should refuse to exercise jurisdiction over this antitrust case. The potential for conflict with Honduran economic policy and commercial law is great. The effect on the foreign commerce of the United States is minimal. The evidence of intent to harm American commerce is altogether lacking. The foreseeability of the anti-competitive consequences of the allegedly illegal actions is slight. Most of the conduct that must be examined occurred abroad. The factors that favor jurisdiction are the citizenship of the parties and, to a slight extent, the enforcement effectiveness of the United

States law.[1] We do not believe that this is enough to justify the exercise of federal jurisdiction over this case.

III.

DISMISSAL OF THE CONSOLIDATED TORT CLAIMS UNDER THE DOCTRINE OF FORUM NON CONVENIENS

After dismissing the antitrust action, the district court dismissed the pendent state tort claims on the basis of forum non conveniens. See Timberlane II, 574 F.Supp. at 1471-72. "The witnesses, the parties, and dastardly deeds all were Honduran; these suits would clearly require us to apply Honduran law to assess liability or damages from the bank branch's activities." Id. at 1471 (footnote omitted). We agree.

The doctrine of forum non conveniens allows the district court to decline to exercise its jurisdiction if, in view of all the competing considerations, the

case is more appropriately tried in another forum. See Cheng v. Boeing Co., 708 F.2d 1406, 1409-10 (9th Cir.), cert. denied, 104 S.Ct. 549 (1983). A determination that jurisdiction should not be exercised is properly left to the discretion of the district court and will not be reversed unless there has been a "clear abuse of discretion." Id. at 1409 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981)). In this case, we find no abuse of discretion in the district court's application of the doctrine.

AFFIRMED.

Appendix "C"

TIMBERLANE LUMBER COMPANY, et al.,

Plaintiffs,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, et al.,

Defendants.

Nos. C 73-0792 SW, C 74-0275 SW, C 74-0277 SW and C 74-0278 SW.

United States District Court, N.D. California

Oct. 24, 1983.

ORDER AND MEMORANDUM OF LAW GRANTING DEFENDANTS MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FORUM NON CONVENIENS, AND DENYING DEFENDANTS MOTIONS FOR JUDGMENT ON PLEADING OR SUMMARY JUDGEMENT

SPENCER WILLIAMS, District Judge.

ORDER AND MEMORANDUM OF LAW

Upon review of all the submitted testimonial, documentary, and other evidence 1/ offered in support of the massive briefing on defendants' motion for summary disposition of plaintiffs'

1/ Since the parties were sent forward in 1977, armed with a new "test", by which the merits of this Court's jurisdiction would be assessed, the amount of discovery conducted has fleshed out both the allegations of misdeeds on both sides, as well as sufficient material from which this Court can evaluate the comparative interests of the United States and Honduras in this matter.

Needless to say, the assortment and volume of the submitted materials present more than adequate documentation of these interests; sifting through the materials has taken this Court much time and involved much research. Compare Zenith Radio Corp. v. Matsushita Electric Industrial, 494 F.Supp. 1161, 1167 (E.D.Pa. 1980), where Judge Becker faced with a similarly acrimonious, and factually complex antitrust suit, addressed many of the same mechanical and substantive problems we were presented with here.

antitrust complaint [2], IT IS HEREBY ORDERED THAT defendants' motion to dismiss for lack of this Court's subject matter jurisdiction is GRANTED. Defendants' motions for judgment, in the alternative, are DENIED. We explain these holdings below.

FACTS:

The first operative facts of this lengthy case occurred in the early 1970's when a small group of United States businessmen attempted a highly leveraged buy-out of a failing Honduran lumber

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2/ Defendants have moved for judgment on alternative grounds of no extra-territorial jurisdiction, or summary judgment on the merits of plaintiffs' antitrust complaint on June 6, 1981. Further briefing of the various issues immediately relevant to those motions was complete on March 28, 1983.

firm. These investors 3/ who had previously joined in other timber-related ventures were enticed by E. H. Robbins to consider Honduras lumber as a new opportunity. In 1971, Sloan Smith, as an agent provocateur of Robbins and his associates, discovered the Lima family mill and timber holdings in an outlying area of Tegucigalpa, the capital city of

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3/ Timberlane Lumber Co., a general partnership with its principal offices in Eugene, Oregon, and other offices in Florida and New York, New York, purchases and wholesales lumber through a network of dealers across the country. Timberlane's principals include both general and limited partners; the exact number and identity of which fluctuated during the course of events with which this Court is concerned. Although the number of financial interested parties has ebbed in recent years, E. H. Robbins ("Robbins") continues to be the managing partner, and will primarily benefit from any recovery.

Honduras. Lima et Hijos, S.A. 4/ had been experiencing a liquidity and management crisis; although originally a small family-managed and prosperous mill, a series of misfortunes had dealt the enterprise severe setbacks. After the death of its founder and family patriarch, the family's tenuous control

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4/ Lima Y Hijos, S. de R.L. ("Lima") was the Honduran limited partnership, through which Timberlane's partners hoped to enter the Honduran lumber market. Prior to Timberlane's entry into this market, at least two Honduran companies, Lima and Jose Lamas, S. de R.L. ("Lamas") competed in the milling and distributing of native pine to domestic and some limited foreign markets. Lima operated a sawmill and remilling plant at Tegucigalpa, and jointly owned 50/50%, with Lamas, a nearly identical plant nearby. While partners, this relationship enabled them to control prices paid for the various raw lumber stocks they purchased from small mill owners, and subsequently resold as rough lumber. Lamas later bought Lima out, leaving the two companies in bitter competition for the business that they had formerly shared.

of the business was threatened by financial obligations the firm had assumed with the Bank of America, Banco de Honduras and one Casanova, a creditor and competing mill.

Enter Timberlane and Sloan Smith.

In 1971, Robbins and other principals of Timberlane Lumber Comany formed two Honduran subsidiaries as investment vehicles in the lumber industry. 5/ The first of these entities was Danli

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5/ Due to diminishing supply of timber in the Northwest, where the Timberlane partners also own and operate milling facilities, Timberlane thought it prudent to seek additional supply of lumber for sale in the U.S. and Canada. It turned to Honduras since, despite an apparent lack of experience or the appearance of comparable development of its industries, the principals were convinced by Smith that it offered an abundant source of commercial quality lumber with cheap labor and transportation costs.

Industrial, S.I. ("Danli") 6/, incorporated in Honduras principally by the Timberlane general partners to acquire lumber contracts in Honduras. A second corporation, Maya Lumber Company, S. de R.L., ("Maya") 7/ was held in a Panamanian shell corporation owned by Smith, and was to obtain the Lima assets, and employ a couple of Lima "hijos" to help

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6/ Danli was organized in May 1971 to acquire Honduran timber and operate a mill sixty miles from the Honduran capitol of Tegucigalpa. Intermittent land title disputes with the native Indian squatters ("campesinos") on the property Danli planned to log prevented effective operations until December, 1972, and again beginning in March, 1973.

7/ Maya was organized as a shell organization in December, 1971, with $2500 capital for the purpose of taking over and operating a sawmill in Tegucigalpa. With $170,000 funneled to Honduras by Timberlane partners through the Panamanian corporation controlled by Smith, Maya was actually the entity which attempted to acquire the principal assets of Lima, in January, 1972.

continue the milling operations. A third corporation, Pinex, S.A. ("Pinex") was to export lumber from Honduras to designated markets.

Throughout 1968-71, the Honduran branch of the Bank of America ("Branch"), continued to increase its exposure on loans to the Limas, in apparent disregard for the home office or regional branch credit officers' admonitions to the Branch that the Lima family business did not appear to merit the credit. The Branch continued to make the loans, without imposing the restrictive requirements urged by these regional loan officers or the home office in San Francisco. 8/

8/ During the fall of 1970, Francisco Lima negotiated with the Bank of America's Tegucigalpa Branch manager, Nasser Bonheur, to increase his line of credit to $250,000, securing it with a

[Footnote Continued On Next Page]

Despite Lima's failure to maintain the precautions considered by the supervisory personnel as essential in safeguarding the Bank's investment in the firm, the Honduran branch was inexplicably overzealous in extending the troubled firm credit. 9/

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general obligation mortgage. The Bank's branch had served as Lima's principal banker since 1968, when the Bank first extended funds in exchange for a form of security interest, discussed infra.

9/ Lima became ill shortly after the Bank increased the firm's line of credit in 1970; his sons, chiefly headed by Ricardo, attempted to manage the company in his absence. After receiving additional personal guarantees of certain family members, the Bank granted Lima an additional $200,000 credit for working capital purposes, upon conditions that: (1) the company change from a partnership to a corporation; and (2) the family contribute its personal loan accounts to the capitalized value of the company, thereby increasing the appearance of the company's net worth to over $1 million. Hosever, these additional funds were never made available to the company.

The Bank, through the Branch, had also maintained normal business relationships with other lumber producers in the country; these dealings included the Bank's extension of sizable loans to finance these entities' activities. At the time of Timberlane's investment in Lima, Lima was indebted to the Bank for borrowings approximating U.S. $250,000, secured by a hipoteca de empressa, a security device provided under Honduran law, entitling the Bank to an all-inclusive right of foreclosure against any of Lima's property.

Lima's deteriorating financial condition intensified their creditors' serious qualms about their exposure to loss on the loans in the event of default. Other creditors of Lima felt as did the regional and home office of the Bank: the time to pull the plug on outstanding

loans had arrived. 10/ A flurry of legal proceedings in Honduras on the outstanding loans to Lima ensued; in an action by Banco de Honduras to foreclose on its loan to Lima, the Bank intervened, pressing its priority against the assets as established by its hipoteca. 11/ Also

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10/ Francisco Lima died in February, 1971, his sons were losing money at the mill, and by May, 1970, the Bank had evaluated its outstanding loan commitment to Lima as "not bankable". The regional office of the Bank, located in Guatemala, instructed the Branch to liquidate the Lima account.

11/ On, or about, April 30, 1971, Banco de Honduras, S.A., another creditor of Lima, brought a foreclosure action before the Juzgado Primero de Letras de lo Civil (First Civil Court of Record) in Honduras. That Court issued an "embargo", or court-ordered attachment, on the Lima assets; but, before a public sale of the property could be held to satisfy that claim, the Bank and another creditor, Pedro Casanova y Hijos, S. de R.L., separately intervened in the lawsuit, each claiming priority of security interests, relying respectively upon a

[Footnote Continued On Next Page]

Casanova, a competing firm, intervened in that action on behalf of its claim secured by a pledge of lumber from Lima's yard. 12/ The Bank prevailed upon Lima's other creditors to accede to its claim's priority; however, these creditors' interests, while subordinated, remained undiluted. 13/

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hipoteca de empressa, and on a pledge of lumber. The two banks later settled their rival claims, with the Bank taking priority; the Bank and Casanova combined and factored their loans to a third-party agent Caminals, for collection.

12/ Casanova, trying to obtain the approximately 800,000 board feet of lumber which it claimed under the terms of its loan, brought two other proceedings: one in the Second Labor Court of Record, and one in the Second Civil Court of Record.

13/ On August 12, 1971, the Bank filed a separate action against Lima in the First Civil Court of Record to foreclose on the hipotec and to enjoin the recording of the attempted conveyance by Lima to the labor union, to settle out

[Footnote Continued On Next Page]

In a second suit filed in a Honduran labor court, the workers' union sought to protect the claims of employees to the wages and concessions promised them by Lima during a conciliatory period from June to July, 1971. By failing to satisfy the workers' claims to accrued wages, after the union had voluntarily deferred collection, upon Lima's assurances that it could work itself out of the then-present cash squeeze, Lima became immediately liable for 150% of back wages and severance benefits in July, 1971.

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standing wage claims of its workers; see text at n. 14, infra. Banco de Honduras and Casanova joined in this action, claiming the conveyance of inventories by the Labor Court to the unions was illegal. The Civil Court upheld the Labor Court on October 22, 1971; on appeal, the Supreme Court ruled that the adjudication of the machinery and equipment had been legal, although Casanova had a prior lien on the lumber inventories.

Notwithstanding its intervention in the suit initiated by the Banco de Honduras, the Bank filed a separate foreclosure action on the hipoteca in August, 1971. The Honduran court which heard the suit decreed another embargo, directing that the Lima assets be sold at judicial auction to satisfy the Bank's claim. The judicial sale never occurred, since Lima has surreptitiously disposed of their interest in these assets to the Union and to Timberlane, leaving the Bank's claim to approximately U.S. $180,000 unsatisfied in late 1971. 14/

14/ On November 17, 1971, the Syndicate offered the Bank the opportunity to buy the machinery and equipment adjudicated to labor to protect the Bank's first mortgage position. Two days later, Bonheur, after consulting the Bank's San Francisco headquarters, responded that the Bank was not interested and that the Syndicate ought to take whatever course

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In late 1971, Timberlane's principals learned from Smith that Lima equipment and capital assets might be obtained from the union. Upon advice of counsel that the Syndicate might convey good title to those assets, they agreed to purchase them, and on January 20, 1972, completed the purchase and recorded the transacton in the Public Register for Commerce. Under Smith's management and supervision, Maya resumed Lima's lumber milling and shipping operations.

Smith and Robbins, on Timberlane's behalf, made multiple entreatments to the Bank, both through the Branch's loan officers, as well as through senior management in San Francisco, to relieve

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it felt in the best interest of the former workers. In January 1972, the Lima conveyance was entered in the Public Registry.

the pressure of its hipoteca upon nascent efforts at reviving Lima's operations under their control. Bonheur responded that the Bank had written off the note, and was not interested in rescheduling or refinancing the debt. Although the Bank's officials in San Francisco met with Robbins and counsel to entertain Timberlane's proposals, no formal or written agreement to restructure the Lima obligation, or commitment to reach an agreement was obtained by Timberlane from the Bank or Branch. Throughout this time, Timberlane, via its various corporate incarnations, attempted to mill and market lumber, using these highly leveraged assets. Their business plan seemed quite simple: with only a minimum cash infusion, the partners in Timberlane had sought to obtain the cooperation of Lima's creditors to permit them the

chance to turn the enterprise around, and reserve for themselves any "upside" profitability, with little, if any, capital investment at risk. Stripped clean of much conflicting evidence of intent, good faith or conspiracy, this amounts to a very simple attempt by Timberlane's partners to force Lima's creditors, if they refused to consent, to an involuntary leveraged buy-out of the goodwill and ongoing productive assets of the company.

Meanwhile, the Bank's attorney, Dr. Guiterrez, advised the Bank that Maya's title to the assets was, in his opinion, defective because of the manner in which the sale by the Syndicate had been conducted. However, by April of 1972, the Bank's mangement, already dismayed by Branch's disregard for its past directives to refrain from increasing the Lima borrowings, reacted to what appeared to

be Timberlane and Lima efforts to secrete assets, and opted to liquidate the outstanding Lima indebtedness.

Being a U.S. multinational, the Bank apparently thought it prudent to avoid having itself, or its Branch, appear to side against the Syndicate's assertion of ownership of the assets on the workers' behalf. Therefore, instead of attacking title directly, the Bank chose to transfer its security interest to Casanova, a lower priority creditor. Casanova, in turn, consolidated the Bank's claim with its own, and transferred both claims to Caminals for collection. In final form, the agreement between these Lima creditors provided that anything realized by Caminals, as substituted plaintiff, would be split proportionately among them.

Caminals, as an undisclosed agent for collection of the substantial debts, obtained another embargo against sale or disposal of the Lima assets by Timberlane or the Limas. He then offered Smith a settlement of the entire matter, upon Timberlane's satisfacton of the outstanding debts secured by the embargo. Instead, Smith, through Maya, instituted suit in Honduras court contesting the claims. When the Honduran court appointed Smith and a second Maya employee as "depositories" (a type of operating trustee over the Lima assets), custody and rightful claim were both further clouded.

At the same time, Caminals filed a "Desposimiento de una Maquinaria Hipoteca" against Maya, seeking satisfaction of Lima's outstanding debts of H.L.

$505,000. 15/ At issue in that action was whether Smith's purported purchase, on Timberlane's behalf, of the union's interest in the Lima assets had been effective to convey good title notwithstanding the original creditors' interests. The Honduran courts granted Caminals summary judgment, and appointed

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15/ On August 24, 1972, Caminals commenced a dispossession action in the First Civil Court of Record against Maya and its principal officers, Smith and Gustavo Lima. Caminals alleged that he rightfully owned both the Bank's and Casanova's security interests, and demanded that either the underlying debts ($250,000, in US$) be paid, or the plant and equipment be surrendered. The Honduran court ruled that the Lima equipment that Maya claimed to have purchased from the union in January, 1972, had been encumbered with, and thus was subject to, these registered security interests.

three custodians to oversee the safekeeping of the Lima assets. 16/

16/ In October, 1972, Caminals formally requested that Smith personally, and as Maya's respresentative, either turn over the encumbered property, or pay the underlying debt. When Maya and Smith failed to comply, Caminals petitioned for, and obtained, further embargoes against Maya, as well as the appointment of three "interventors" who, under Honduran law, were charged with a type of trusteeship. The interventors, in an attempt to review Maya's financial records and insure against diminution in the value of the embargoed property, took over custody of the mill. Caminals also petitioned, and the Honduran courts approved, deployment of the Honduran security policy to guard the mill and prevent violence from erupting. These prophylactic measures were only partially successful.

Maya subsequently accused the trial judge of bias, and obtained a change of venue, a new judge, and replacement of the three interventors with a single interventor. After a number of inconclusive court proceedings, the First Court of Appeal in Honduras (Corte Primera de Apelaciones) held, in January, 1973, that the appointment and substitution of the single interventor was illegal, and deemed null and void. The Court reaffirmed the substance of early

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Both sides were also employing extra-judicial means [17] to regain control of the assets while the legal proceedings were pending. [18] As well as

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judicial decisions, which had rendered the outside creditors, now Caminals, a priority, secured interest, superseding the purported transfer to Maya. The original three interventors were reappointed; and, in April, 1973, Caminals petitioned the court to set a date for public auction of the property.

17/ The Court will not recount the numerous incidents and allegations of illegal, illicit or duplicitous conduct offered by both sides in this suit. To the extent that this conduct constituted actionable tort, these torts were cognizable under Honduran law; if criminal behavior, it was up to the Honduran officials to prosecute internal criminal codes.

18/ During the following 18 months, Maya sought review of each decision in Caminals' favor, thereby delaying the public auction and judicial sale until October, 1975, when Caminals acquired the embargoed assets for about $190,000. Although Maya had maintained that it would file a civil suit for damages it claimed resulted from Caminals' foreclosure action, it never commenced additional litigation in Honduras.

hiring lawyers in respective efforts to wrest any residual value from the Lima assets, the parties engaged in mudslinging advertisement of their dispute in the local papers, as well as questionable private hiring of government militia to take custody of assets and their opponents. It appears that both sides interpreted the ordinary course of Honduran litigation to countenance the bribery of judges and law officers, and suborn perjured testimony from prospective witnesses. That the Bank obtained governmental assistance in protecting its claims, as well as ultimately prevailed in the Honduran litigation, could be attributed to either having won upon the merits of the dispute notwithstanding the various "dirty tricks", or to the greater experience and defter hand a multinational bank wielded in a small,

strife-torn Central American state. We need not, nor will we, decide that here.

After the judicial sale of the Maya assets was finally held in Honduras in 1975, Caminals acquired title to the embargoed property for U.S. $190,000. Danli applied for, and received, an off-setting embargo for Caminals' breach of his promise to sell-out the Bank's interests by acting as a turncoat witness against the Bank. The Limas, Danli, Maya and Smith ultimately agreed to and, in 1977, executed a settlement extinguishing their claims against Caminals.

I. Procedure in United States Federal and State Courts

While these Honduran suits were still pending, the Timberlane partners brought a federal antitrust action and a California state unfair competition suit based on the Honduran conduct. In

addition, various agents of the Timberlane partners initiated individual federal diversity tort claims against the Bank, all of which were related to the antitrust suit which had been assigned to U.S. District Judge Lloyd Burke (N.D. Cal.) Judge Burke dismissed the principal action: the lumber partnership's allegations of harassment by the Bank of America, frustrating its attempts at exporting Honduran lumber to the Caribbean Islands, Europe and the United States, largely in reliance upon the act of state doctrine. Judge Burke also dismissed the three diversity tort suits brought by employees of the related businesses for their personal injuries allegedly suffered during the "Timberlane

incident", on the grounds of forum non conveniens. 19/

Independently, the Supreme Court of California refused to review the appellate court's affirmance of the state trial court's grant of the Bank's motion to dismiss for forum non conveniens.

Judge Burke's dismissals were reversed and remanded to this court by the Ninth Circuit in an opinion which fashions an entirely new approach 20/ for

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19/ The four "related" actions referred to here as: Timberlane Lumber Co., Danli Industrial, S.A., Maya Lumber Co. S. de R.L. ". Bank of America National T. & S. Assoc. et al.; C 73-0792SW ("Timberlane"); Gordon Sloan Smith v. Bank of America Nat'l T. & S. Assoc. et al; C 74-0275SW ("Smith tort suit"); Jorge Lima v. Bank of America National T. & S. Assoc. et al.; C 74-02775SW, ("Lima tort suit"); and, Miguel Ardon v. Bank of America National T. & S. Assoc. et al.; C 74-0278SW ("Ardon tort suit").

20/ Timberlane Lumber Co. et al., v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) ("Timberlane I").

evaluating when extraterritorial application of the United States antitrust laws is appropriate. 21/ Our dismissal for want of subject matter jurisdiction is consonant with the instructions from the Circuit upon remand in light of the facts as developed in the course of intervening discovery. 22/

By our denial of defendants' motion, in the alternative, for summary judgment, however, we do not categorically reject the use of summary disposition, on the merits, of an antitrust claim. We merely apply the Ninth Circuit's stringent

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21/ See, Timberlane I at 609, 613-615.

22/ The Ninth Circuit's opinion in Timberlane I specifically requires that plaintiffs attempting to apply the Sherman Act extraterritorially establish both "acts" with effects on domestic or foreign commerce of the United States, and some plaintiff with "standing" to challenge those acts. 549 F.2d at 615.

standard to such motions. Poller v. C.B.S., 368 U.S. 464, 485, 82 S.Ct. 486, 497, 7 L.Ed.2d 458 (1962).

The Timberlane I opinion, as well as the subsequent case law, compels this court to employ the sophisticated distinction between evaluating subject matter jurisdiction on a motion to dismiss, as opposed to treating it as a "speaking motion" under a summary judgment procedure. Definite distinction exists between use of plenary review to discern if there are disputed material facts relevant to this Court's jurisdiction as contrasted to disputed material facts relevant to the substantive requirements for an antitrust violation. We also have ascertained that review of the question of this Court's jurisdiction to hear this claim should be entertained as an initial matter, before those of the merits.

Since we deem the undisputed material facts show extra-territorial application of the antitrust laws inappropriate to this case, our ruling on defendants' motion for summary judgment does not reach the merits of plaintiffs' antitrust allegations. 23/

[1-3] A motion to dismiss for lack of subject matter jurisdiction may either attack the facial sufficiency of the complaint's allegations, or be made as a "speaking motion" addressing the factual support for the court's subject matter jurisdiction. Thornhill Publishing Co.

23/ An excellent explanation of what is aptly described as "legislative jurisdiction", and its particular relevance to the extraterritorial application of laws initially drafted for domestic application is provided in Kitner & Griffin, Jurisdiction over Foreign Commerce under the Sherman Antitrust Act, Vol. XVIII No. 2 Boston College Ind. & Com.Law.Rev. 199, 204-205, esp. n. 33. (Jan. 1977).

v. General Telephone & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). A facial attack requires that the court accept the plaintiff's allegations as true, in evaluating whether its complaint adequately asserts the court's subject matter jurisdiction. A factual attack challenges the foundation for the plaintiff's representations of subject matter jurisdiction in the complaint, notwithstanding his averments, permitting the court to consider matters outside the pleadings, such as deposition and affidavit testimony. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980), citing Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977); Adams v. Bain, supra; Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981).

[4, 5] As a "speaking motion" to dismiss for lack of subject matter jurisdiction, the court does not attach any presumptive truthfulness to the plaintiff's allegations; in other words, "summary judgment treatment is not required for a 'speaking motion' to dismiss for lack of subject matter jurisdiction." Timberlane I at 602; Fed.R.Civ.Pro. 12(b)(1); 2A Moore's Federal Practice ¶ 12.09[3], at 2297-2300, 2313 (2d ed. 1975). The existence of disputed material facts does not preclude this court from evaluating for itself the merits of the plaintiff's jurisdictional allegations. Thornhill, 594 F.2d at 733; Grafon Corp. v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979); De Lancie v. Birr, Wilson & Co., 648 F.2d 1255, 1258 (9th Cir. 1981).

of this issue. In the case of certain withheld testimonial evidence from witnesses outside the jurisdictional reach of this Court, we accept plaintiffs' allegations, as a proffer of proof in lieu of these witnesses' testimony.

[8] Although a district court generally must treat a motion to dismiss for failure to state a claim as one for summary judgment, when considering matters outside the pleadings, a motion for lack of subject matter jurisdiction is not so converted; therefore, our consideration of the facts established by discovery does not make it proper for us to grant summary judgment for the defendants, rather than dismiss plaintiffs' complaint for lack of subject matter jurisdiction. Stanley v. Central Intelligence Agency, 639 F.2d 1145, 1158 (5th Cir. 1981).

[9] Yet, just as summary judgment is not favored in antitrust cases, particularly where motive and intent are at issue, dismissal of antitrust claims for want of subject matter jurisdiction is similary disfavored where the jurisdictional issue is inextricably tied with the merits of the antitrust claims. Chatham Condominium Assn. v. Century Village, Inc., 597 F.2d 1002, 1011 (5th Cir. 1979); see, Mortensen, 549 F.2d at 892-96. Arguably, in such instances, disposal of the complaint under a Fed.R.Civ.P. 12(b)(1) proceeding lacks the safeguards intended by holding the court to a more plaintiff-oriented stance under Fed.R.Civ.P. 12(b)(6) dismissals for Fed.R.Civ.P. 56 motions.

However, in the case at bar, two factors overcome our initial reservations against summary disposition of antitrust

[6, 7] Moreover, a factual attack may occur at any state of the proceedings, with the Court having the obligation to resolve the matter of its subject matter jurisdiction by exercising its authority, as requested by motion or sua sponte, under Fed.R.Civ.Pro. 12(h), to ascertain whether the facts underlying the allegations support jurisdiction. See, Berardinelli v. Castle & Cooke, Inc., 587 F.2d 37, 39 (9th Cir. 1978). If the plaintiffs' allegations fail this scrutiny, the court does not have jurisdiction to consider other substantive motions upon those pleadings; this means that the court may not entertain a defendant's motion to dismiss for failure to state a claim upon which relief can be granted, or summary judgment. Menchaca, 613 F.2d at 512; accord, McLain v.Real Estate Board of New Orleans, 583 F.2d

1315, 1324 (5th Cir. 1978) ("determination that jurisdiction is wanting must displace any conclusion as to the sufficiency of the claim ....").

Nevertheless, because the plaintiff bears the burden of establishing the court's jurisdiction, (see, e.g., Mortensen, supra, 613 F.2d at 884, 890-92; Menchaca, 613 F.2d at 511; Thornhill, 594 F.2d at 733), the court should not resolve the jurisdictional issue until affording the plaintiff an opportunity to develop any relevant evidentiary matters bearing on that issue through discovery. Timberlane I, 549 F.2d at 602; c.f., Berardinelli, 587 F.2d at 39; Heille v. City of St. Paul, 671 F.2d 1134, 1136 (8th Cir. 1982). In the case at bar, the plaintiffs and defendants have been permitted unfettered discovery of material relevant to our consideration

complaints. First, both sides have been afforded an adequate opportunity to discover, and have supplied this court with, more than sufficient factual material by which we may determine our jurisdiction over the complaint. 24/ Second, in

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24/ We acknowledge that plaintiffs had sought additional discovery in connection with the merits of their allegations. However, even assuming that Pazmino and Bonheur were within the subpoena range of this Court and were to testify substantially as the plaintiffs proffer, our holding that we should not exercise extraterritorial jurisdiction over the antitrust claims is founded on the plentiful record before us. Whether or not Bonheur "made a bundle" from his actions on the Bank's behalf, we assume that the Bank and the Branch mutually reached the decision to liquidate the outstanding Lima loans, and not to negotiate a settlement with Timberlane. Although we might have some reservations about entering summary judgment on the defendants' behalf with outstanding discovery under Fed.R.Civ.P. 56(f), we have no such hesitation under this jurisdictional inquiry. See e.g., Lucas et al. v. Bechtel Corp., 633 F.2d 757, 758 (9th Cir. 1980). We note that the

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presenting its opposition to defendants' motion to dismiss for lack of jurisdiction, plaintiffs do not adequately distinguish between the substantive requirements of a well-plead complaint seeking domestic application of the antitrust

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Circuit, as well as district courts in this and other circuits, carefully scrutinizes summary dispositions in factually complex litigation; we have applied a rigorous standard of proof to defendants' claims of plaintiffs' deficiencies of evidence on the Timberlane I tripartite test, and conclude that, on the issues material to that determination, there is neither material issue of fact to be culled from the submissions, nor is there inference or reference to such evidence favorable to plaintiffs which, even taken in the most favorable light to defeat dismissal, could support such a result. C.f., Smith v. Gross, 604 F.2d 639, 641 (9th Cir. 1979); Black v. Payne, 591 F.2d 83, 89 (9th Cir. 1979). Also see, Grafon Corp. v. Hausermann, 602 F.2d 781, 783 (7th Cir. 1979).

laws, from that seeking extraterritorial application of those laws. 25/

Here, the facts which are relevant to determining the appropriateness of applying antitrust laws to evaluate the plaintiffs' claims are largely undisputed, and are subtly different from

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25/ Similar tests have been applied in contract; see, e.g., Vespa of America Corp. v. Bajaj Auto Limited, 550 F.Supp. 224 (N.D. Cal. 1982); Compania De Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322, 325-26 (5th Cir. 1982); Thom P. Gonzalez v. Consejo Nacional, etc., 614 F.2d 1247, 1253 (9th Cir. 1980); in securities; see e.g., Leasco Data Processing Equipment Co. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972), also see, Comment, The Transnational Reach of Rule 10(b)(5), 121 U.Penn.L.Rev. 1363, 1393; in intellectual property; see, e.g., Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 426-31 (9th Cir. 1977); Centronics Data Computer Corp. v. Mannesmann, 432 F.Supp. 659, 662 (D.N.H. 1977); libel; see e.g., De Roburt v. Gannett Co., 548 F.Supp. 1370, 1374 (D. Hawaii 1982); and environmental/conservation litigation; see e.g., Conservation Counsel of Western Australia, Inc. v. ALCOA, 518 F.Supp. 270, 274-76 (W.D. Pa. 1981).

those relevant to determining an anti-trust defendant's liability. Summary dismissal is appropriate if the facts relevant to a determination of the jurisdictional issue are different from those underlying the allegations of anticompetitive practices. Indeed, the 9th Circuit has held that a party is entitled to have the jurisdictional issue submitted to a jury only where that jurisdictional question: whether the extra-territorial reach of the Sherman Act extends to the alleged restraint on U.S. foreign commerce, and the substantive issue of whether the conduct is violative of the Sherman Act, are factually so "completely intermeshed" that the question of jurisdiction depends upon a

decision on the merits. Berardinelli, 587 F.2d at 39. 26/

[10] Since the jurisdictional and substantive issues underlying our review of plaintiffs' antitrust complaint are not identical, this Court need not render, de facto, a determination on the merits of the plaintiffs' claim merely by reaching one on the procedural issues. Because extraterritorial application of the substantive antitrust laws is inappropriate under consideration of all relevant facts, we are without jurisdiction to entertain plaintiffs' allegations upon its substantive claims. Chatham, 597 F.2d at 1012; see, Rosemound Sand and

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26/ See Ongman, Be No Longer A Chaos: Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L.Rev. 733 (1977); Atwood & Brewster, Antitrust and American Business Abroad, 2d ed., (1980), pps. 156-162.

Gravel Co. v. Lambert Sand & Gravel Co., 469 F.2d 416, 418 (5th Cir. 1972).

However, a wee peek at the merits of the plaintiffs' substantive allegations convinces us that, even if plaintiffs' proffer of evidence in opposition to the defendants' motions were to be wholly unobjectional, admissible and probative, plaintiffs' allegations do not justify exercise of this Court's jurisdiction. Our jurisdiction is not supported by every conceivable repercussion on U.S. commerce, even if occasioned by the most reprehensible business torts; "only those injuries to United States commerce which reflect the antitcompetitive effect of the violation, or of antitcompetitive acts made possible by the violation, constitute effects sufficient to confer jurisdiction." National Bank of Canada

v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981).

It appears to this Court, upon reviewing all the evidence in this matter, that this lawsuit - essentially a group of separate tort actions which were deemed unsuccessful in Honduran courts - has been repackaged as an antitrust case in an attempt to subvert prudent and traditional limits upon applications of our laws to foreign conduct and actors. We commend plaintiffs for their perserverence and indefatigable enthusiam, as well as their building the quintessential Trojan horse from the ashes of their aborted investment in Honduras.

However clever the draftsmenship, regardless of what discovery could be extracted from the Bank and its agents, no edifice of antitrust claims could withstand the inherently rickety

foundations upon which this suit rests. If we were to decide, arguendo, that dismissal for lack of jurisdiction were inappropriate, we would most likely conclude that summary judgment could be granted to defendants for the failure of plaintiffs to produce sufficient evidence on the substantive elements of their claims. 27/

Second, although we are well aware of the reluctance and skepticism with which trial courts should consider defendant motions for summary judgment in complex antitrust litigation, we note that it is not, nor has it ever been, the law of this Circuit that federal district courts must abstain from enforcing the constitution's strict requirements for

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27/ See Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 512 (5th Cir. 1980).

jurisdiction to consider a controversy because such scrutiny would result in disposition of the matter short of trial.

Such early disposition should not be precluded merely because the substantive allegations involve issues of antitrust; when properly considered, disposition of a controversy on preliminary jurisdictional grounds provides a valuable means of conserving scarce judical time and resources. Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1257 (9th Cir. 1982).

Balancing the interests of the private parties now before this court against the interest of the United States legal system in preserving the legitimacy and fundamental fairness of its laws, we determine that to permit the further maintenance of this suit, on the pretext that plaintiffs' allegations are properly

within the scope of our antitrust laws, would dilute those very laws beyond legitimacy. 28/

II. Statement of the substantive test of international antitrust:

[11] Under the "effects" test first outlined by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), even wholly foreign conduct may come within the sweep of the antitrust laws if it has a sufficient effect on U.S. interstate or

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28/ Compare the recent Laker Airways Limited v. Pan American World Airways, et al., 568 F.Supp. 811 (D.D.C. 1983), order filed March 9, 1983, in which Judge Richey addresses KLM's argument that perhaps there would not be antitrust jurisdiction to consider Laker's allegations. This case and Laker, supra, are easily distinguishable on their facts (see Laker, supra, at n. 21 and 22); indeed, Laker is a recent touchstone of an appropriate extraterritorial application of U.S. antitrust laws.

foreign commerce; it is probably unnecessary for that effect to be both substantial and direct, as long as it is not de minimis. See, Timberlane, 549 F.2d at 611-12. Initially, a critical factor is whether the plaintiffs can show that the defendants' method of enforcing its security interest in the Lima assets was intended to, or did, have an anticompetitive effect upon a relevant geographic and product market in the United States.

Yet, because this classic Alcoa test failed to take account of important considerations of international comity, reciprocity and foreign policy, the Ninth Circuit substantially modified the applicable standard by which to assess the complaint's jurisdictional sufficiency, when the plaintiffs here sought application of the U.S. antitrust laws to its allegations. In evaluating whether the

plaintiff has alleged a cause appropriately within the extraterritorial reach of the Sherman Act, we have balanced the impact of the Bank's conduct on U.S. commerce against the potential ramifications of asserting jurisdiction. See, Timberlane at 611-614; Mannington Mills, 595 F.2d at 1294-98; Dominicus Americana Bohio v. Gulf & Western, 473 F.Supp. 680, 687 (S.D.N.Y. 1979). The framework of this balance is designed to detect when the U.S. interests in the "foreign" dispute are too weak - and the interests of restraint from extending our substantive law to judge that dispute too strong - making assertion of jurisdiction inappropriate. Timberlane I at 609.

We measure the relative strengths of these interests by considering whether: (1) the alleged restraint affects, or was

intended to affect, the foreign commerce of the United States; (2) the deed was of such a type or magnitude so as to be cognizable as a violation of the Sherman Act; and (3) an extension of extraterritorial jurisdiction would violate international comity and fairness. Timberlane I at 615. In refashioning our approach to applying U.S. statutory law - here antitrust - the Ninth Circuit split the traditional talismanic "act of state" doctrine into two branches: politcal affront to a sovereign and choice of law. If there is a political question involved, the court usually chooses to drop the matter, citing the act of state doctrine. 29/ If not, we pick up the

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29/ Act of state emerged after Timberlane I, at least in this Circuit, as a much more restrictive and arguably

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choice of law analysis to assess which

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more effective defense to application of U.S. antitrust laws, inter alia. The new criterion appears to be whether the exercise of sovereignty involves the public interests of the foreign state, as compared with the interests of private citizens. Timberlane I at 605, quoting Restatement (Second) of the Foreign Relations Law of the United States § 41 Comment d (1965). Under this standard, the decisions of the lower courts of Honduras were no longer sacrosanct from this Court's scrutiny, simply because each was an official expression of a sovereign state's view of private property interests within its boundaries, or as between individuals submitting themselves to its jurisdiction.

However, we do not take the Circuit view of act of state beyond its reasonable meaning. For example, clearly we should not immunize the Bank or its agents, simply because they have secured one or more favorable court decisions adjudicating their superior claim to certain assets in Honduras. Here, these court decisions both (1) merely provide part of the rich factual texture of intrigue in this case; and, (2) appear to be only a neutral application of Honduran law. C.f., Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983). But, we do not look beyond the face of the court proceedings, unless violative of a properly

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body of law - U.S. or foreign - should be applied, in light of the quantity and quality of the parties' contacts. 30/

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extraterritorial restriction like the Foreign Corrupt Practices Act or Securities Act of 1933 on its own merit, to "impugn or question the nobility of a foreign nation's motivation." Timberlane I, 549 F.2d at 607.

30/ There is room however, for consideration of the extent and quality of redress that a dispute, which presents itself to a U.S. court, has been afforded in another jurisdiction, as part of the third prong of the "Timberlane test". In probing the value or intrinsic propriety of juxtaposing our antitrust doctrine into a ripened tort suit, we do take note of the exhaustive scrutiny which the parties underwent in Honduras, and the juridical facts that emerge from that litigation.

We feel that courts are appropriately sensitized to the "gray" area between absolution upon act of state considerations, and discounting any government interests which fall short of this rigorous standard. Here, we feel that the fact that this litigation centers around the lumber industry of Honduras, certainly a crucial aspect of its patrimony, demands that we interject our antitrust overlay more cautiously

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Assessing the factors under this "jurisdictional rule of reason", we believe that extraterritorial application of the Sherman Act is inappropriate in this case. This process is a question of law, determinable from the relevant and admissible evidence presented to the court in an expedited fashion by the parties on litigants' or court's insistence. Although we do not believe this is a matter solely within the trial court's discretion, our findings upon the parties' submissions are entitled to the same deference typically accorded judicial determination of fact.

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because comity contemplates such sensitivity. In this regard, brief mention should be made about the effect, if any, of an official expression of the Honduran government, which is one of those "gray areas".

liquidate the outstanding indebtness against Lima's assets.

There is no evidence linking the home office of the Bank to an anticompetitive scheme or monopolistic attempts by the other Honduran lumber producers; one can assume, if Congress were faced with drafting the Sherman Act legislation today, in light of the increasing complexity of regulating conduct of the many multinational corporations with significant contacts with the United States, it would render more explicit guidance as to the Act's intended reach of foreign subsidiary conduct. However, as it is posed before this Court, the evidence presented in the record could not establish an anticompetitive intent even at the subsidiary level.

However, upon the evidence submitted by Timberlane on the issue of the extent

to which the Bank's decision necessarily precluded its foray in the enumerated lumber markets, we assume that the "very low threshold", intended to restrict only the most trivial of claimed effects, has been met.

B. Timberlane's Standing to Assert Antitrust Claims:

There are four different impediments to Timberlane's maintenance of this action on behalf of the persons, real or juridical, whom it claims were injured in the manner proscribed by the U.S. anti-trust laws. Briefly, these arguments are: (1) that Lima, not Timberlane or any of its investors, was the entity within the target area of the Bank's acts; (2) that, at best, Timberlane merely held a derivative interest in an entity engaged in the Honduran lumber industry; (3) that Timberlane was not

In order to weigh the comparative interest of the U.S. in providing a forum for the plaintiffs with the negative ramifications of extraterritorial applications of the U.S. antitrust law, we must assess, at a preliminary stage, the anticompetitive effects of the Bank's and its agents' actions, including whether they occurred in the U.S. or in Honduras; whether the markets affected were in the U.S. or abroad; and whether any indirect anticompetitive effects in the U.S. or abroad were foreseeable or intended. We must also consider the plaintiffs' suit and its relationship to this forum: whether U.S. citizenship of, or ownership interests in the plaintiff are significant factors militating our jurisdiction, or whether the plaintiff's access to or recourse in a foreign court has provided

it meaningful opportunities for redress of its allegations.

Finally, although the judiciary is the most ill-equipped branch of the U.S. government to do so, we are charged to make a limited inquiry into the effect of the defendants' and plaintiffs' actions upon U.S. foreign policy. We have divided this into two parts: the anticipatable annoyance or infringement that Honduras might feel if rulings in this matter were to have the effect, albeit indirectly, of rendering an "advisory" judgment on the state of their domestic lumber industry; 31/ and the broader

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31/ In the Diplomatic Note 148, the executive branch of the Government of Honduras expresses some concern over the effects that this litigation may have in three respects. First, that the anti-trust complaint in this action is based upon notions of law which are

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valid security interest, using all means at its disposal permitted under Honduran law, is not tantamount to an intention to crush the plaintiffs' participation in the marketplace. At best, a reasonable interpretation of the plaintiffs' allegations would be that the Bank knew, or reasonably should have foreseen, that the inevitable result of pressing its interests in the manner it chose would doom the plaintiffs' efforts to revitalize the mill.

It is not at all clear that the Bank's knowledge - that enforcing its legitimate security interest against otherwise productive assets would frustrate a potential entrant's competitive efforts - constitutes a sufficent basis upon which to assess antitrust liability. In its simplest form, the plaintiffs would have us rule that, as a

matter of law, a United States multinational corporation cannot enforce its rights under another jurisdiction's commercial law, in the means permitted by that jurisdiction, if a foreseeable result of its action is to foreclose commercial opportunities to U.S. interests in that country. In this case, plaintiffs seek to attach those commercial opportunities to an entity comprised of U.S. citizens; however, any entitlement to this Court's jurisdiction which is argued on this theoretical, and easily manipulated, basis fails to address the concerns which provoked the three part "Timberlane test". The better, and more logical, line is the quality and quantity of the nexus between the defendants' conduct and the U.S. See, e.g., Leasco Data Processing Equip. Co. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972);

Restatement (Second) of the Conflict of Laws §§ 37, 50 (1971); Centronics Data Computer Corp. v. Mannesmann, AG, 432 F.Supp. 659 (D.N.H. 1977); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981) cert. denied 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); I.S. Joseph Co., Inc. v. Mannesmann Pipe, et al., 408 F.Supp. 1023 (D.Minn. 1976).

Other courts have recognized, as has the Ninth Circuit implicitly in this test, that assessment of the effect of the defendants' conduct within the forum may delay decision of the matter of the court's jurisdiction. Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co., 499 F.Supp. 829, 840-41 (D.Or. 1980).

In this instance, we have grave doubts, after considering the plaintiffs' evidence, that either the Branch's or its agents actions, or the infinitesimally

small quantity of Honduran pine which could have, under the certification requirements and competitive conditions existing at the time of Timberlane's foray in Honduras, could have possibly affected U.S. foreign commerce in the previously defined product or geographic markets. Although plaintiffs allege the Bank's San Francisco office conspired to frustrate Timberlane's activities, the evidence in the record, at best, supports only the conclusion that the "head office" had grown perturbed with the Branch's failure to protect the Bank from exposure to potential loss on an unjustifiably increasing extension of credit to Lima and, although willing to discuss the effects of its decision with Timberlane's agents, the San Francisco office was unwilling to forestall its recourse to

implicatons of an unwarranted export of our antitrust laws to Honduras.

Although less apparent, and arguably less crucial, we consider the extensive Honduran litigation of this matter very relevant both to assess the recourse provided the plaintiffs on their allegations, as well as to alert us to the real

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"unrecognized" in Honduras. Second, that the lawsuit seeks to rehash a matter finally litigated in Honduras, with a res judicata effect. Third, the action seeks to regulate conduct in a state-regulated (COHDEFOR) industry. Additionally, plaintiffs were, by official communication from the Honduran Attorney General, offered an "adequate" forum in Honduras for dispute resolution. DX 179. Notwithstanding this Note, and the defendants' arguments, we do not accord this communication much independent significance. When compared to the vehement opposition mustered in other instances of extraterritorial application of U.S. laws, this solicited communication pales. See Atwood & Brewster, supra Chapter 4: Foreign Interests and Reactions, pps. 82-86. We do consider it within our balance of comity issues, infra, along with a survey of Honduran law applicable to this dispute.

possibility of causing the sovereign state embarrassment by reopening matters which have been afforded full and fair process. If this were an instance of a domestic court's consideration of a matter litigated in a domestic counterpart's courts, our inquiry would be at an end. We believe that to provide the type of forum which the plaintiffs seek here would, of necessity, require us to look behind Honduran law, into court process and internal workings, in a manner that has traditionally been disdained under the recognition principle. On a policy level, this plenary examination would establish a dangerous precedent.

A. "Effects test"

Although similar in some measure to the standard appropriate on summary judgment, by requiring a showing of some effect, actual or intended, upon U.S.

foreign commerce, the "jurisdictional rule of reason" legitimizes the exercise of a consideration of the plaintiffs' allegations under our laws. While the sophistication and subtlety of modern commerce have rendered the strict territoriality test of American Banana impractical, and the intent and effect test a bit too amorphous, recent cases grappling with the conerns which led these early courts to attempt guidelines by which to provide some legitimacy to extraterritorial application of statutory law, have suggested a way to apply the Circuit's mandate in this case.

We take the plaintiffs' allegations of an anticompetitive effect in a relevant product market as true, as if this were a Fed.R.Civ.Pro. 12(b)(6) motion. See Zenith Radio v. Matsushita Elect. Indus. Co., 494 F.Supp. 1161, 1171 at ft.

21, 1175, 1177 (E.D. Pa. 1980). The central inquiry is whether the plaintiffs ever were potential competitors in the markets that they allege were actually, or were intended to be, rendered anti-competitive. To assess actual, or intended anticompetitive effect, it is necessary for the plaintiffs to define a product and geographic market to which they sought to supply, and to establish that they possessed the resources to do so. 32/ The plaintiffs allege that their combined efforts to establish themselves in Honduras as a viable supplier of varying quality of Honduran pine to the United States, were sufficient to confer upon them the requisite interest to be

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32/ United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 394, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956); Fount-Wip v. Reddi-Wip, 568 F.2d 1296, 1301-1302 (9th Cir. 1978).

safeguarded under U.S. antitrust law. Plaintffs allege two such markets: supplying crossarms and utility pole nationally and supplying the Southeastern United States and Gulf Coast states - particularly Florida, the Virgin Islands and the Commonwealth of Puerto Rico - with lumber for housing. A third market, that of use nationally in high-grade specialty products, had not yet been entered. Naturally, plaintiffs fix responsibility for their inability to compete upon the Bank, by its refusal to permit them greater opportunity to "work" off the Lima mill debts, and by "squeezing" the mill into insolvency.

Although we would explore the plaintiff's level of participation and volume of commerce in these markets with a more skeptical eye below if assessing the merits of defendants' motion for summary

judgment, we do not have that task here. We agree here with the plaintiffs; by alleging the ability and willingness to supply cognizable markets with lumber that they allege would have been competitive with that already in the marketplace, they have satisfied this prong of the Circuit's test. As for the plaintiffs' allegations of the Bank's intentions to frustrate its production and sale of Honduran lumber, construed in the light most favorable to the plaintiffs, at most the Bank could reasonably have anticipated that, by assigning its valid security interest for collection to Caminals, via Casanova, as an independent contractor, it remained susceptible to antitrust liability.

However, even if we accept plaintiffs' assertions in toto, the Bank's intention to maximize collection of that

injured in the manner in which the anti-trust laws were designed to protect competition; finally, (4) that the Bank neither held, nor sought, monopoly power in the lumber industry.

Although Timberlane sought to dedicate the Lima assets to use by its family of related "shell" corporations, at best its activities were contemporaneous with, or just a bit after, the Bank in San Francisco's order to its Honduran branch to liquidate Lima's outstanding indebtedness was finally heeded. In addition to a failure of its evidence to support a link other than that an inevitable and, necessarily contingent, interest of a creditor in his debtor's financial fortunes, there is no theory upon which even the plaintiffs would seek to hold the defendants liable. The most obvious gap in the plaintiffs' standing is the

apparently uncontradicted conclusion from the evidence that the plaintiffs' allegations focus upon deeds of the Honduran branch personnel committed long before Maya had even been organized to operate the Lima mill. The injuries to the other related entities, as plaintiffs concede, resulted from its attempts to shift or transfer assets from Maya to the other companies.

Additionally, Timberlane's interests in Maya, Danli, Pinex and in the assets which it sought to acquire from Lima were derivative at best. An attempt to assert a shareholder's or partner's interest in a competitive enterprise allegedly injured by reason of anticompetitive acts is not cognizable. Danli was organized in 1971; stock was issued to a U.S. partnership, Pine Products (67%); 20% to Honduran individuals; 6% to United States

citizens, in exchange for future services to the corporation; and only 7% actually was distributed to the Timberlane partnership.

Maya was organized later in 1971, owned principally by Herb Robbins and his wife. Although plaintiff's best case for standing to challenge the legality of the Honduran branch's deeds is based upon its various allegations of injury to Maya, these allegations focus upon the branch's conduct prior to Maya's formation.

Timberlane was a partnership primarily engaged in uncovering opportunities in lumber supply for its wholesaling activities in the United States. It never was in the position to exploit opportunitites in Honduras that it alleges were blocked by the Bank, since it never was legally registered to export lumber from Honduras, regardless of that

supply's unmarketability in the United States.

It is clear from the evidence submitted on behalf of its complaint that Timberlane's standing is deficient in two respects. Not only has its showing that it was the target of any anticompetitive actions by the Bank fallen short of convincing us that it was within the "target area" of anticompetitive animus, but also it has failed to overcome a presumption of duplicate recovery or complex damage apportionment between splintered proprietary interests, all equally (if adversely) affected by the defendants' actions.

Finally, the plaintiffs have produced no evidence that the defendants attempted to gain, or possessed, even by derivative interest, any monopoly power in the Honduran lumber market.

its security interests, the Bank unavoidably frustrated Timberlane's speculation in the assets which secured the Bank's loans to Lima. However, to take the heroic leap which plaintiffs encourage here, we would be endorsing a form of no-fault antitrust liability upon creditors, who by enforcing their legal security interests, necessarily halt the productive life of those assets. We think that the absurdity of this result is not mitigated by plaintiffs' quickness to reconstruct speculative U.S. markets to which it might, given other hypothetical factors have been able to supply lumber.

C. Comparative Interest Analysis of Relevant Factors in Extra-territorial Application of Antitrust Laws:

The comparative interest analysis suggested by the Circuit can best be

applied in three parts: would we strain U.S. antitrust law beyond credibility by applying it to these facts (choice of law); in light of Honduran consideration of the plaintiffs' allegations, would this Court's consideration be redundant or a source of tension between the U.S. and Honduras, the U.S. and other sovereigns, or a U.S. multinational and the nations in which it conducts business (most appropriate forum); and, notwithstanding the inappropriateness of applying U.S. law to the complaint, or the opportunity for creating resentment between sovereigns or tension between multinational corporations and their host countries, whether the complaint alleges acts or intentions with nefarious, and more than de minimus, effect upon competitive conditions in the U.S. domestic or foreign marketplace.

Nonetheless, the Circuit's articulated standard for permitting an aggrieved plaintiff standing to bring suit is a minimal threshold. 33/

Timberlane alleges that, by the formation of the conspiracy between the Branch and the other lumber companies in Honduras, it had established itself as a viable potential entrant to the U.S. market. Although it makes little business sense that the Bank would choose sides against Timberlane's efforts when,

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33/ Timberlane I, supra, at 615. The Circuit did not consider on appeal the issue of whether the apparently twice-removed injury for which Timberlane seeks redress here is sufficient to confer antitrust standing. We believe that the double attenuation: first, because the allegedly antitrust competitive acts were directed at Lima, not Maya; and second, because, at best, Timberlane's interest in the activities of Maya was that of a shareholder, would normally bar Timberlane from suit, for lack of standing.

from the evidence, it does not appear any of the other lumber concerns to which it had lent money were successfully or significantly committed to U.S. export opportunities, we assume arguendo that the Bank did actively engage in actions with an intention to frustrate Timberlane's investment. We need not speculate or justify the Bank's reasons for demanding that Timberlane repay the outstanding Lima debt if it wished to use the assets; certainly, according to the applicable Honduran law, in substantial harmony with the law of this jurisdiction, the Bank had a valid security interest secured by the Lima assets. Plaintiffs' novel interpretation of the legal effect of the Bank's auditors of conformance to the generally accepted accounting procedure of acknowledging a substantial uncertainty of full collection on the Lima debts,

while bold, is patently ridiculous. In fact, the Bank's actions in "writing down" the Lima account is more valuable evidence of the rationale of the Bank in assigning the debt for collection by various nationals as agents.

Regardless of the intentionally low, and admittedly permissive, threshold at which the Circuit has established standing in this tripartite inquiry, its requirements do pose an insurmountable barrier to the plaintiffs' standing here. Even if we were to overlook the plaintiffs' failure to qualify legally in Honduras to compete in the export of lumber, or as a commercial matter in the United States, by obtaining the ASLA grading necessary to market its product, as well as accept the tenuous proposition that the Bank maintained the requisite stake in its competitors allying it for

antitrust purposes with a putative cartel, we cannot accept Timberlane's arguments of standing for two overriding reasons.

First, were we to impute the Branch's, or the San Francisco headquarters', mischievous deeds against Lima to Timberlane, we would commit two errors of substantial magnitude. First, mindful of the Supreme Court's admonition that the antitrust laws protect competition, not competitors, we are reluctant to permit Timberlane to purchase Lima's cause of action, especially in view of its unwillingness to purchase the assets free and clear of valid security interests. Second, if we were to scrutinize the Bank's actions which give rise to any cognizable action at law, we would conclude that they were directed at Lima; by preventing Timberlane's circumventing

Turning first to the appropriateness of applying U.S. antitrust law to the plaintiffs' allegations, we deem Honduran law clearly superior by which to judge defendants' conduct, and to provide plaintiffs with any remedies appropriate. Although plaintiffs have brought this action styled with U.S. citizens on both sides, we look through the formal pleadings into the substance of the action. The true nature of the complaint is an action in tort and contract by the Limas against certain personnel of the Bank's branch in Honduras. At best, the United States citizens' interests in the matter are derivative: Timberlane to the Lima concern, Bank of America in San Francisco, as the parent corporation. All of the crucial percipient witnesses to the incidents were either Honduran citizens or

residents; almost all of the events which form the basis of this suit occurred in Honduras. The only United States citizens or interests involved in this incident clearly, and consensually, conducted their affairs subject to Honduran contract, tort, civil and penal law.

In this case, the tortious conduct of which the plaintiffs complain occurred in Honduras. Were this simply a straight-forward tort complaint, the only legitimate choice of law would be Honduran; in this event, we would clearly dismiss for forum non conveniens. 34/ Narrow exception to this rule is taken in the case of a tort, such as antitrust or environmental contamination, where the offending actions have substantial effect upon parties before the courts of those

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34/ See, Ongman, supra at 752.

distant jurisdictions. Here, given the indisputably nascent efforts of the plaintiffs to establish a chain of somewhat related enterprises to produce lumber in Honduras, with an eye to eventual export, if ever legally and commercially feasible, the directly anticompetitive effect of the Bank's decision to liquidate Lima's indebtedness was felt in the marketplace in which the Lima assets supplied lumber: Honduras and, to a far less degree, the Caribbean. Although Lima and the Timberlane entities may have consummated some sales in Puerto Rico and negotiated toward others in Florida, any effect that Lima's demise had upon

competitive conditions in the U.S. foreign was de minimus. 35/

Unlike the first prong of the Timberlane test, in this inquiry the weight, as opposed to the mere existence, of the commerce is significant. The minimal commercial opportunity for Honduran lumber in the U.S. is important to our assessment of whether the Bank's actions could have been intentionally directed

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35/ Plaintiff alleges that, at its height, Maya and Danli were responsible for approximately one and one-half percent of the pine market in the U.S., in the relevant product markets. Although this may be sufficient showing to satisfy the first prong of the three-prong test, we do not consider this of such a magnitude to carry the day on the third prong. C.f., Daishowa Intern'l v. No. Coast Export Co., 1982-2 Trade Cas. ¶ 64,774 (N.D. Cal. 1982) No. 81-574 RPA (May 24, 1982); Industrial Investment Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864 (10th Cir. 1981); Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F.Supp. 680, 687 (S.D.N.Y. 1979).

Appendix "D"

TIMBERLANE LUMBER CO., DANLI INDUSTRIAL, S.A., MAYA LUMBER CO., S. de R.L.,

Plaintiffs-Appellants,

v.

BANK OF AMERICA, N.T. & S.A., PEDRO CASANOVA E. HIJOS, S.A., BANK OF AMERICA CORP., IMPORTADORE MAYORISTA, S. de R.L., MICHAEL CASANOVA, NASSER BONHEUR, MANUEL RUIS, LOUIS PASMINO, HENRY MALATESTA, JOSE GONZALES, PATRICK BYRNE,

Defendants-Appellees.

GORDON SLOAN SMITH,

Plaintiff-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Defendant-Appellee,

MIGUEL ARDON,

Plaintiff-Appellant,

v.

BANK OF AMERICA , N.T. & S.A.,

Defendant-Appellee.

at, or their effect predictable upon, U.S. commerce in lumber. Were we to apply either the traditional territorial, most significant relationship, or comparative interest analysis tests of conflicts of law, we would select Honduran law for application.

This is precisely what the Honduran courts afforded plaintiffs' complaint. Any further consideration by the federal court system in the United States would be both redundant, as well as a dangerous signal of American xenophobia and provinciality. 36/

Adequate and fair process was accorded the injured parties; simply cosmetic alteration of the litigating

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36/ Also see 49 Antitrust Law Journal 1191, 1197 (1980).

party cannot circumvent this fact. 37/ Appropriate remedies were available to the plaintiffs under Honduran law; certainly the volume and variety of the legal proceedings verify the ample procedure avenues open to plaintiffs. We accept the foreign judgments on the

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37/ Nothing in plaintiff's affidavits, especially affidavit 27 prepared by Serapio Hernandez Castellanos, then Attorney General of Honduras, dispels this conclusion. Although, upon summarizing relevant sections of the Commerce Code; e.g., Articles 442, 423, 424, and 425, he apparently concluded, in response to a very abstract hypothetical question, that

> (t)he Government of Honduras would not object to the exercise of antitrust laws, if such application does not violate or waive the fulfillment of the Honduran rights, both internal and international, and does not harm Honduran persons, or otherwise compromise or harms (sic) our sovereignty.

Castellanos aff. at 4, this is not the inquiry before this Court. Our inquiry is not merely whether we could legitimize an antitrust inquiry into the actions of various parties in Honduras, but rather whether we should.

existence and validity of security interest encumbering the Lima assets, as well as the judicially decreed measures, which interrupted Timberlane attempts at a "leveraged buy-out" without creditor cooperation. We note no conflict of philosophy between U.S. and Honduran law on this point. 38/ Were this a judgment

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38/ Our understanding of the Circuit's guidance upon remand for our application of this new test, is that compatibility of the two legal systems is necessary, but not sufficient to rest extraterritorial jurisdiction upon. Having concluded that the United States and Honduras laws (see A Statement of the Laws of Honduras in Matters affecting Business, 4th ed., Ramirez, Dante Gabriel and Ramirez, Roberto, General Secretariat, Organization of American States, Wash. D.C., 1981, pps. 177, 202-203, 232-233) are in theoretical harmony on monopolistic business practices, banking and security interests, we note an inclination in the Honduran law to reserve more power over foreign investment in their country. Certainly, this is the sovereign's prerogative; however, under this orientation, and in view of

[Footnote Continued On Next Page]

of a sister state within the U.S., the principles of collateral estoppel and res judicata would dispose of most of plaintiffs' allegations here.

We do find indications of opportunities to create needless tensions by our consideration of these allegations. Although the meaning of the Honduran diplomatic note is equivocal, a U.S. Court would by necessity have to overlook the practical sensitivity of our

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the identity in approach to monopolization that plaintiffs urge between the U.S. and Honduras, we deem it particularly appropriate that plaintiffs have waged their litigation in Honduras. We see no prejudice to them by pursuing their theories in that country; in the balance, when viewed alongside the countervailing public policy interest in not becoming an officious intermeddler in other nations' internal affairs, when those affairs have only a de minimus effect on our commerce, the inhospitality of this Court's forum is an appropriate result of a more appropriate forum elsewhere.

interference, which in any degree, would be superfluous, with an industry heavily regulated by another sovereign state, as well as in an internal incident which has already consumed extensive Honduran judicial resources.

In assessing the effect that our consideration of this matter would have, we cannot say that our consideration of the matter under U.S. antitrust standards would be appropriate even if all the acts alleged by Timberlane to have been taken by the Bank are true. The only form of relief which would be awarded, treble damages, would penalize the Bank for its status as a United States national only [39/]; under such a rule, other multinational organizations would be subject

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39/ See, e.g., Atwood & Brewster supra, § 5.11, esp. at 126.

not only to liability for their host country's law, economic community laws, United States laws applicable properly extraterritorially, but also to a type of russian roulette tort liablity if their adversary can sell rights to an antitrust claim to a United States entity, for prosecution of the suit. This quest after a deep-pocket U.S. defendant, with none of the safeguards provided by prosecutorial discretion in criminal antitrust, or agency enforcement actions, would have virtually no saving grace. 40/

[12] As for the three pendent state tort actions, we dismiss each on the basis of forum non conveniens. The witnesses, the parties, and dastardly deeds all were Honduran; these suits would

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40/ See Panel Discussion, 49 Antitrust Law Journal, supra, at 1221-1222.

clearly require us to apply Honduran law to assess liability or damages from the bank branch's activities. 41/ Certainly these tort actions should properly be brought in that forum.

Timberlane's principals took a gamble by attempting to pursue a chimerical investment. Their lack of sensitivity to

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41/ For recent cases describing the modern approach to forum non conveniens, see, e.g., Laker Airways Limited v. Pan American World Airways, et al., 568 F.Supp. 811 at 814 (D.D.C. 1983); Cheng v. Boeing Co., et al., 708 F.2d 1406 at 1407, discussing Gulf Oil v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). Here we conclude that the Bank has made a "clear showing of facts" which establishes that plaintiffs' prosecution of this action in this forum is an attempt to relitigate matters which already have been addressed in Honduras, as well as those speculative "pie in the sky" theories which, in light of "considerations affecting the court's own administrative and legal problems" applying U.S. antitrust laws to this affair, should have been properly before the Honduran courts instead. Cheng, supra, at 1411, quoting Miskow v. Boeing Co., 664 F.2d 205, 208 (9th Cir. 1981).

cultural, legal and technological differences between the U.S. and Honduras was the real culprit, if there be one, responsible for their losses. Honduras, while undoubtedly accommodating to foreign investment, be it smaller companies like Timberlane or large multinationals like the Bank, is entitled to the respect of this Court.

Respect takes many forms as this Circuit has admonished us. Regard for the codification of its cultural, business and ethical mores, as well as the integrity of its system of justice, leads us inextricably to conclude that we need DISMISS these actions. IT IS SO ORDERED.

JORGE LIMA,

Plaintiff-Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN., and BANK OF AMERICA CORP.,

Defendants-Appellees.

Nos. 74-2142, 74-2354, 74-2812 and 74-2813

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

December 27, 1976.

As Amended on Denial of Rehearing and Rehearing En Banc March 3, 1977.

Appeal from the United States District Court for the Northern District of California.

Before BROWNING and CHOY, Circuit Judges, and GRAY */

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*/ The Honorable William P. Gray, United States District Judge, for the Central District of California, sitting by designation.

OPINION

CHOY, Circuit Judge:

Four separate actions, arising from the same series of events, were dismissed by the same district court and are consolidated here on appeal. The principal action is Timberlane Lumber Co. v. Bank of America (Timberlane action), an antitrust suit alleging violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and the Wilson Tariff Act (15 U.S.C. § 8). 1/ This action raises important questions concerning the application of American antitrust laws to activities in another country, including

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1/ The Wilson Tariff Act is a less comprehensive statute than the Sherman Act, often applied in combination with it. It has been said that the statute makes explicit the prohibitions of the Sherman Act in the field of foreign commerce. United States v. General Electric Co., 80 F.Supp. 989, 1017 (S.D.N.Y. 1948).

actions of foreign government officials. The district court dismissed the Timberlane action under the act of state doctrine and for lack of subject matter jurisdiction. The other three are diversity tort suits brought by employees of one of the Timberlane plaintiffs for individual injuries allegedly suffered in the course of the extended anti-Timberlane drama. Having dismissed the Timberlane action, the district court dismissed these three suits on the grounds of forum non conveniens. We vacate the dismissals of all four actions and remand.

I. The Timberlane Action

The basic allegation of the Timberlane plaintiffs is that officials of the Bank of America and other located in both the United States and Honduras conspired to prevent Timberlane, through its

Honduras subsidiaries, from milling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. The intent and result of the conspiracy, they contend, was to interfere with the exportation to the United States, including Puerto Rico, of Honduran lumber for sale or use there by the plaintiffs, thus directly and substantially affecting the foreign commerce of the United States.

Procedural Background

Some of the defendants moved to dismiss the Timberlane Action. 2/ After a hearing and the submission of

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2/ As specified below, other defendants have not been served and have not appeared.

memoranda, affidavits, and depositions by both sides, the district court granted the motion in a brief judgment entered on March 20, 1974. The court gave as its reason "that it is prohibited under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce," the latter apparently being deemed a prerequisite for jurisdiction. No specific findings of fact were announced, nor were any more extensive conclusions of law stated. 3/

3/ Only slightly more light on the court's reasoning is shed by a review of the transcript of the hearing, at the conclusion of which the court expressed its view as follows:

> I am of the opinion that this action is an attempt to relitigate the Honduras litigation on the basis of

[Footnote Continued On Next Page]

It is unclear whether the decision was a dismissal for lack of subject matter jurisdiction or for failure to state a claim, F.R.Civ.P. 12(b)(1) & (6), or a summary judgment under F.R.Civ.P. 56. It appears from the transcript of the hearing that the district court and the defendants believed they were acting

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> a rather ingenius [sic] antitrust theory. However, even assuming the theory to have merit, I think the case of Occidental Petroleum versus Buttes Gas [331 F.Supp. 92 (C.D. Cal 1971), affirmed, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972); gives the last Appellate view on this situation.
>
> I think the Act of State Doctrine does apply to the product of litigation in Honduras and I think that, under those circumstances, the motion to dismiss should be granted, and that is the order.
>
> Also of the opinion that this Court lacks jurisdiction on any theory of foreign commerce.

Reporter's Transcript 79.

under Rule 12. 4/ Plaintiffs here argue, however, that the defense motion was, in any event, based upon and incorporated affidavits which the court did not exclude, and as such it was a "speaking motion" which must be treated as a motion for summary judgment under the tests of Rule 56. Under Rule 56(e), they contend, they should have been allowed discovery.

[1, 2] Affidavits were submitted and cited by the defendants to the district court and again to us. These submissions were not explicitly excluded by the district court. Plaintiffs are correct in their assertion that Rule 12(b) requires Rule 56 treatment when a motion to dismiss for failure to state a claim (Rule 12(b)(6)) is made and "matters outside the pleading are presented to and

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4/ Reporter's Transcript 77-78.

not excluded by the court." Erlich v. Glasner, 374 F.2d 681 (9th Cir. 1967). A motion to dismiss based on the act of state doctrine raises such a Rule 12(b)(6) objection, not a jurisdictional defect. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92, 113 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

[3] However, it is also true that summary judgment treatment under Rule 56 is not required for a Rule 12(b)(1) "speaking motion." 2A Moore's Federal Practice ¶ 12.-09[3], at 2297-2300, 2313 (2d ed. 1975). Therefore, because "speaking motions" to dismiss for want of subject matter jurisdiction are permitted, id. ¶ 12.09[2], at 2288, a dismissal based on affidavits alone

without Rule 56 treatment might conceivably be sustainable on this ground.

[4] On the other hand, if the district court did hold as its basis for dismissing for lack of subject matter jurisdiction that the alleged facts bore an insufficient relation to the foreign commerce of the United States, that same deficiency could also be considered a ground on which the suit could be dismissed for failure to state a claim under the antitrust laws. See Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 742 n.1, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). Although the Supreme Court in Hospital Building did not elaborate, it seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to

dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous. O'Neill v. Maytag, 339 F.2d 764, 766 & n.3 (2d Cir. 1964). See Bell v. Hood, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Such is clearly not the case here. 5/

Thus, if the district court dismissed under either Rule 56 itself or Rule 12(b)(6) (the proper motion for a defense pleading either the act of state doctrine or the lack of a sufficient nexus between the alleged violation and our foreign commerce), Rule 56 treatment would seem to have been indicated for the instant case. See also Rule 12(c).

5/ See pp. 613-15, infra.

[5] Having secured Rule 56 treatment, it does not, however, necessarily follow that plaintiffs were entitled under Rule 56(e) to full discovery. That section provides only that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." (Emphasis added.) Accordingly, plaintiffs had no general right to discovery under the provisions of Rule 56(e).

Nevertheless, we note that the Supreme Court has expressed disapproval of summary disposition in this type of case:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony

> can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Putting plaintiffs to the test in such cases without ample opportunity for discovery in particularly disfavored. Hospital Building, supra 425 U.S. at 746, 96 S.Ct. 1848. From our review of the allegations and affidavits of both sides, it is clear to us that the factual circumstances here involved are indeed complicated. Therefore, in spite of the nonmandatory nature of Rule 56(e), we do not feel that it was proper to dismiss the instant complaint

without affording plaintiffs an opportunity for full discovery. 6/

Moreover, the affidavits and depositions which were offered to the district court indicate clearly that, at least as to the act of state defense, there remained issues of material fact to be resolved. Thus, summary judgment treatment of that issue would seem to have been inappropriate. As the above-quoted passage from Poller indicates, in-court testimony of witnesses and trial by jury generally are the preferred mode of disposing of cases such as this.

The only other possible basis on which the district court could properly

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6/ Perhaps if it could be shown that defendants' activities had no effect on our foreign commmerce, and were intended to have none, dismissal under Rule 12(b)(1) without discovery would be sustainable. See pp. 608-15 & nn. 14 & 19 infra.

have dismissed this suit would have been a ruling that plaintiffs, even with the aid of discovery and the benefit of all doubts on disputed points, could under no circumstances have established a claim for relief. We will, therefore, review the judgment on that basis, treating it as a Rule 12(b)(6) dismissal. Accordingly, we assume the allegations of the Timberlane plaintiffs to be true. Under the circumstances of the instant case, we find pertinent the recent observation of the Supreme Court in Hospital Building:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 [78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84] (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," Poller v. Columbia Broadcasting, 368 U.S. 464, 473 [82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464] (1962), dismissals

> prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted.

Hospital Building, supra, 425 U.S. at 746-47 96 S.Ct. at 1853.

Cast of Characters

There are three affiliated plaintiffs in the Timberlane action. Timberlane Lumber Company is an Oregon partnership principally involved in the purchase and distribution of lumber at wholesale in the United States and the importation of lumber into the United States for sale and use. Danli Industrial, S.A., and Maya Lumber Company, S. de R.L., are both Honduras corporations, incorporated and principally owned by the general partners of Timberlane. Danli held contracts to purchase timber in Honduras, and Maya was to conduct the milling operations to

produce the lumber for export. (Timberlane, Danli, and Maya will be collectively referred to as "Timberlane.")

The primary defendants are Bank of America Corporation (Bank), a California corporation, and its wholly-owned subsidiary, Bank of America National Trust and Savings Association, which operates a branch in Tegucigalpa, Honduras. Several employees of the Bank have also been named and served as defendants: Nasser Bonheur, manager of the Tegucigalpa branch from 1970 through January 1972; Jose Gonzales, Bonheur's successor as manager of the Tegucigalpa branch; Luis Pazmino, 7/ Regional Vice President for Central America, based in Guatemala City, with authority over the Tegucigalpa

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7/ Pazmino was initially identified incorrectly as "Louis Pasmino".

branch; and Henry Malatesta, Vice President and Senior Credit Administrator for Central America and the Caribbean, based in San Francisco. Bonheur, Gonzales, Pazmino, and Malatesta are all citizens of the United States.

Other defendants have been named, but have not been served. Included in this group are two more Bank employees in Central America: Manuel Ruiz, 8/ a citizen of the United States, and Patrick Byrne, a citizen of Canada. Also unserved are two Honduras corporations, Pedro Casanova e Hijos, S.A., and Importadore Mayorista, S. de R.L., and Michael Casanova, a citizen of Honduras (together referred to as "Casanova"), who together represent one of the two main

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8/ Ruiz was initially identified incorrectly as "Ruis".

competitors to Timberlane and its predecessor in the Honduran lumber business.

Timberlane also cited defendants "Does I to X." Named and served as Doe I, but entering only a special appearance before the district court, was Laureano Gutierrez Falla, a citizen of Honduras and Honduran counsel for both the Bank and Danli during the time of the alleged conspiracy.

The Timberlane complaint identified two co-conspirators not named as defendants. Jose Lamas, S. de R.L. (Lamas), a Honduran corporation, is the second major competitor in the lumber business. Jose Caminals Gallego (Caminals), a citizen of Spain, is described as an agent or employee of the Bank in Tegucigalpa.

Facts as Alleged

The conspiracy sketched by Timberlane actually started before the

plaintiffs entered the scene. The Lima family operated a lumber mill in Honduras, competing with Lamas and Casanova, in both of which the Bank had significant financial interests. The Lima enterprise was also indebted to the Bank. By 1971, however, the Lima business was in financial trouble. Timberlane alleges that driving Lima under was the first step in the conspiracy which eventually crippled Timberlane's efforts, but the particulars do not matter for this appeal. What does matter is that various interests in the Lima assets, including its milling plant, passed to Lima's creditors: Casanova, the Bank, and the group of Lima employees who had not been paid the wages and severance pay due them. Under Honduran law, the employees' claim had priority.

Enter Timberlane, with a long history in the lumber business, in search

of alternative sources of lumber for delivery to its distribution system on the East Coast of the United States. After study, it decided to try Honduras. In 1971, Danli was formed, tracts of forest land were acquired, plans for a modern log-processing plant were prepared, and equipment was purchased and assembled for shipment from the United States to Danli in Honduras. Timberlane became aware that the Lima plant might be available and began negotiating for its acquisition. Maya was formed, purchased the Lima employees' interest in the machinery and equipment in January 1972, despite opposition from the conspirators, and re-activated and the Lima mill.

Realizing that they were faced with better-financed and more vigorous competition from Timberlane and its Honduran

subsidiaries, the defendants and others extended the anti-Lima conspiracy to disrupt Timberlane's efforts. The primary weapons employed by the conspirators were the claim still held by the Bank in the remaining assets of the Lima enterprise under the all-inclusive mortgage Lima had been forced to sign and another claim held by Casanova. Maya made a substantial cash offer for the Bank's interest in an effort to clear its title, but the Bank refused to sell. Instead, the Bank surreptiously conveyed the mortgage to Casanova for questionable consideration, Casanova paying nothing and agreeing only to pay the Bank a portion of what it collected. Casanova immediately assigned the Bank's claim and its own on similar terms to Caminals, who promptly set out to disrupt the Timberlane operation.

Caminals is characterized as the "front man" in the campaign to drive Timberlane out of Honduras, with the Bank and other defendants intending and carrying responsibility for his actions. Having acquired the claims of Casanova and the Bank, Caminals went to court to enforce them, ignoring throughout Timberlane's offers to purchase or settle them. Under the laws of Honduras, an "embargo" on property is a court-ordered attachment, registered with the Public Registry, which precludes the sale of that property without a court order. Honduran law provides, upon embargo, that the court appoint a judicial officer, called an "interventor" to ensure against any diminution in the value of the property. In order to paralyze the Timberlane operation, Caminals obtained embargoes against Maya and Danli. Acting

through the interventor, since accused of being on the payroll of the Bank, guards and troops were used to cripple and, for a time, completely shut down Timberlane's milling operation. The harassment took other forms as well: the conspirators caused the manager of Timberlane's Honduras operations, Gordon Sloan Smith, to be falsely arrested and imprisoned and were responsible for the publication of several defamatory articles about Timberlane in the Honduran press.

As a result of the conspiracy, Timberlane's complaint claimed damages then estimated in excess of $5,000,000. Plaintiffs also allege that there has been a direct and substantial effect on United States foreign commerce, and that defendants intended the results of the

conspiracy, including the impact on United States commerce. 9/

Act of State

The classic enunciation of the act of state doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42, L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

From the beginning, this principle has been applied in foreign trade antitrust cases. In American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53

9/ Plaintiffs have, since filing the complaint, expanded and elaborated on their charges. Although our evaluation is centered on the complaint, the pleadings are to be broadly construed, and for the purpose of clarity the narrative here has drawn upon portions of the additional material.

L.Ed. 826 (1909), the first such case of significance, the American owner of a banana plantation caught in a border dispute between Panama and Costa Rica claimed that a competitor violated the Sherman Act by persuading the Costa Rican government to seize his lands. The act complained of would have required an adjudication of the legality of the Costa Rican seizure, an action which the Supreme Court said our courts could not challenge. More recently, see Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92 (C.D. Cal. 1971), affirmed 461 F.2d 1261 (9th Cir.) cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972), the case mentioned from the bench by the district court here in ruling in favor of the defense motion to dismiss.

The defendants argue - as the district court apparently held - that the injuries allegedly suffered by Timberlane resulted from acts of the Honduran government, principally in connection with the enforcement of the security interests in the Maya plant, which American courts cannot review. Such an application of the act of state doctrine seems to us to be erroneous. Even if the coup de grace to Timberlane's enterprise in Honduras was applied by official authorities, we do not agree that the docrine necessarily shelters these defendants or requires dismissal of the Timberlane action.

[6] The leading modern statement of the act of state doctrine appears in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Despite contrary implications in

Underhill and American Banana, the Court concluded that the doctrine was not compelled by the nature of sovereignty, by international law, or by the text of the Constitution. 376 U.S. at 421-23, 84 S.Ct. 923. Rather, it derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government:

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. at 423, 84 S.Ct. at 938. The Court recognized that not every case is identical in its potential impact on our relations with other nations. For instance:

> [S]ome aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Id. at 428, 84 S.Ct. at 940. Thus the Court explicitly rejected "laying down or reaffirming an inflexible and all-encompassing rule." Id. Whether forebearance by an American court in a given situation is advisable or appropriate depends upon the "balance of relevant considerations." Id.

It is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), the Canadian government had made a private corporation its

exclusive agent for the purchase of vanadium, a material used in steel production. The Canadian corporation, acting in concert with an affiliated American company, used its position to exclude a competitor of the American affiliate from the Canadian market. The Court held that the Canadian corporation's activity was not entitled to immunity, carefully noting that the plaintiff did not question the validity of any action taken by the Canadian government and that there was no indications that any Canadian government official "approved or would have approved" of the monopolizing efforts. Id. at 706, 82 S.Ct. 1404.

In Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976), interventors appointed by the Cuban government to take possession of and operate

nationalized Cuban cigar manufacturers had been paid large sums by importers in the United States and elsewhere for pre-nationalization shipments. These payments were found to have been made in error, since they should have been made to the prior owners of the cigar firms. The importers sought to recover the money. Counsel for the Cuban government and the interventors argued that the interventors' refusal to repay the pre-intervention sums represented a sovereign repudiation of any obligation to refund the amounts and as such an act of state not subject to challenge in American courts. The Court disagreed, refusing to conclude that "the conduct in question was the public act of those with authority to exercise sovereign authority and was entitled to respect in our courts." Id. at 694, 96 S.Ct. at 1861.

There was no proof that the failure of the interventors to repay the money reached the level of an "act of state," a sovereign assertion of the Cuban government:

> No statute, decree, order or resolution of the Cuban government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Id.

[7] A corollary to the act of state doctrine in the foreign trade antitrust field is the often-recognized principle that corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself. Thus, in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291 (D.Del 1970), a refusal by defendants to sell Venezuelan crude oil to plaintiff was

held not to be an illegal restraint of trade because it was a complete defense that the Venezuelan government had imposed a boycott forbidding such sales. The court there observed that "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign." Id. at 1298.

On the other hand, mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a defense. In United States v. Sisal Sales Corp., 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927), the defendants were accused of conspiring to monopolize sales of sisal, a material used in making rope, from Mexico to the United States by inducing Mexican officials to recognize the

conspirators as the exclusive traders and to impose discriminatory taxes on rival sellers. The Court rejected the defendants' claim to act of state protection, ruling that a conspiracy formed in the United States for the purpose of monopolizing sales to the United States was not protected simply because one element of the conspiracy involved securing favorable action by foreign officials. In Continental Ore, the Court indicated that it continued to accept the Sisal reasoning. See 370 U.S. at 705, 82 S.Ct. 1404.

The distinction was recognized and relied upon in United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cases ¶ 70,352 (S.D.N.Y. 1965), the "Swiss Watch" case:

> If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation. In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.

See Davidow, Antitrust, Foreign Policy, and International Buying Cooperation, 84 Yale L.J. 268, 282-83 (1974); W. Fugate, Foreign Commerce and the Antitrust Laws 75-82 (2d ed. 1973); Kintner & Hallgarten, Application of United States Antitrust Laws to Foreign Trade and Commerce,

15 B.C. Ind & Com.L.Rev. 343, 356-58 (1973). 10/

[8] The touchstone of Sabbatino - the potential for interference with our foreign relations - is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. Sabbatino, 376 U.S. at 423, 84 S.Ct. 923. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of Sabbatino, id. at 428, 84 S.Ct.

10/ While recognizing the general principle, we do not necessarily endorse the strict view that American courts can never review action compelled by a foreign government. There may be occasions when such review is nonetheless justifiable, but that question is not raised here.

at 940, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

While we do not wish to impugn or question the nobility of a foreign nation's motivation, we are necessarily interested in the depth and nature of its interest. The Restatement (Second) of Foreign Relations Law of the United States § 41 (1965) makes an important distinction on this basis in limiting the deference of American courts:

> [A] court in the United States ... will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to <u>give effect to its public interests</u>. [Emphasis added.]

The "public interest" qualification is intentional and significant in the

context of Timberlane's action, as a comment to § 41 makes plain:

> Comment d. Nature of act of state. An "act of state" as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory .... A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interest.

Id. at 127. 11/

11/ Illustrations 4, 5 and 6 accompanying this comment demonstrate how a court's judgment can be, but usually is not, an act of state:

> 4. In a suit in tort by X against Y, a court of state A decides that X is entitled to a specified amount of damages. This decision is not an act of state within the meaning of the rule stated in this Section.
>
> 5. In an action to determine title to land, brought by X against Y, a court of state A decides that X is the owner of the land. This

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[9] On the basis of the foregoing analysis, we conclude that the court below erred in dismissing the instant rule on the authority of Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92, 108-13 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). The actions of the Honduran government that are involved here - including the application by its courts and their agents of the Honduran laws concerning security interests and

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decision is not an act of state within the meaning of the rule stated in this Section.

6. State A obtains by eminent domain proceedings title to an electric utility system in its territory. The vesting of title is an act of state within the meaning of the rule stated in this Section.

As used in this Restatement, "state" refers to a sovereign nation, not to one of the United States.

the protection of the underlying property against diminution - are clearly distinguishable from the sovereign decrees laying claim to off-shore waters that ere at issue in Occidental Petroleum, see 331 F.Supp. at 99-101 & n. 11. Here, the allegedly "sovereign" acts of Honduras consisted of judicial proceedings which were initiated by Caminals, a private party and one of the alleged co-conspirators, not by the Honduran government itself. Unlike the Occidental Petroleum plaintiffs, see id. at 110, Timberlane does not seek to name Honduras or any Honduran officer as a defendent or co-conspirator, nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. In fact, there is no indication that the actions of the

Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained. Compare Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. at 695, 96 S.Ct. 1854. Moreover, and once again unlike the situation in Occidental Petroleum, see 331 F.Supp. at 109-10 n. 28, plaintiffs here apparently complain of additional agreements and actions which are totally unrelated to the Honduran government. These separate activities would clearly be unprotected even if procurement of a Honduran act of state were one part of defendants' overall scheme. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. at 704-05, 82 S.Ct. 1404; United States v. Sisal, 274 U.S. at 275-76, 47 S.Ct. 592.

Under these circumstances, it is clear that the "act of state" doctrine does not require dismissal of the Timberlane action.

Extraterritorial Reach of the United States Antitrust Laws

[10] There is no doubt that American antitrust laws extend over some conduct in other nations. 12/ There was

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12/ The subject of extraterritorial jurisdiction of American antitrust laws is one about which there has been a great deal of discussion. The commentaries cited in this opinion represent only a fraction of those discussing the subject. Worthy of special comment are K. Brewster, Antitrust and American Business Abroad (1958), and W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973). There has, however, been much less action. In actual litigation, jurisdiction has not often been found lacking. Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases; not one was lost for want of jurisdiction over the activities claimed to violate the law. W. Fugate, Foreign Commerce and the Antitrust Laws, App.B. at 498 (2d ed. 1973). The instant

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language in the first Supreme Court case in point, American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), casting doubt on the extension of the Sherman Act to acts outside United States territory. But subsequent cases have limited American Banana to its particular facts, and the Sherman Act - and with it other antitrust laws - has been applied to extraterritorial conduct. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); United States v. Sisal Sales Corp, 274

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case is, of course, a private action, but reported dismissals of such cases also appear to be infrequent. The only case lost on appeal on this ground was American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), a decision which is today considered largely obsolete. Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521 (1974).

U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1927); United States v. Aluminum Co. of America, 148 F.2d 416, (2d Cir. 1945) (the "Alcoa" case). 13/ The act may encompass the foreign activities of aliens as well as American citizens. Alcoa, supra; Swiss Watch, 1963 Trade Cases ¶ 70,600; United States v. General Electric Co., 82 F.Supp. 753 (D.N.J. 1949), judgment implementing decree, 115 F.Supp. 835 (D.N.J. 1953).

That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations

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13/ For an extended discussion of this evolution, see W. Fugate, supra, at 40-43, 66-73; Report of the Attorney General's National Committee to Study the Antitrust Laws 66-76 (1955).

have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts. See A. Neale, The Antitrust Laws of the United States of America 365-72 (2d ed. 1970); Assn. of the Bar of the City of New York, National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations 7-18 (1957); Zwarensteyn, The Foreign Reach of the American Antitrust Laws, 3 Am.Bus.L.J. 163, 165-69 (1965). Our courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics. See Alcoa, 148 F.2d at 443; Swiss Watch, 1965 Trade Cases ¶ 71,352 (modification of order); General Electric, 115 F.Supp. at 878 (implementation of decree). In any event, it is

evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.

What that point is or how it is determined is not defined by international law. Miller, Extraterritorial Effects of Trade Regulation, 111 U.Pa.L.Rev. 1092, 1094 (1963). Nor does the Sherman Act limit itself. 14/ In the

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14/ The tendency seems to be for federal regulation statutes to contain sweeping jurisdiction language. Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, reach, respectively, "[e]very contract ... in restraint of ..." and "[e]very person who shall monopolize, or attempt to monopolize ... any part of" "the trade or commerce among the several States, or with foreign nations." Although it may be "evident from the text of the antitrust statutes" that "some [actual or intended] effect on our foreign commerce is a prerequisite to jurisdiction," Occidental Petroleum, 331

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domestic field the Sherman Act extends to the full reach of the commerce power. United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 558, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). To define it somewhat more modestly in the foreign commerce area courts have generally, and logically, fallen back on a narrower construction of congressional intent, such as expressed in Judge Learned Hand's oft-cited opinion in Alcoa, 148 F.2d at 443:

> [T]he only question open is whether Congress intended to impose the liability and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words,

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F.Supp. at 102 (emphasis in original), the statutory terms themselves are not precise or limited enough to provide additional guidance to the courts. See Trautman, Appendix to Chapter 11 in K. Brewster, supra, at 313.

> such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

It is the effect on American foreign commerce which is usually cited to support extraterritorial jurisdiction. Alcoa set the course, when Judge Hand declared, id.:

> [I]t is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize. 15/

15/ Such an assertion of authority based on internal consequences is generally described as the "objective territorial" principle of jurisdiction. See W. Fugate, supra, at 35-39.

Despite its description as "settled law," Alcoa's assertion has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment. 16/ Nonetheless, American courts have firmly concluded that there is some exterritorial jurisdiction under the Sherman Act.

Even among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend. The district court here concluded that a "direct and substantial effect" on United States foreign commerce was a prerequisite, without stating whether other factors were relevant or considered. The same formula was

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16/ See, e.g., A. Neale, supra, at 362-72; Haight, Comment to Miller, supra, 111 U.Pa.L.Rev. 1117, 1118-20 (1963); Ellis, Comment to Miller, supra, 111 U.Pa.L.Rev. 1129, 1129-32 (1963).

employed, to some extent, by the district courts in the Swiss Watch case, 1963 Trade Cases ¶ 70,600 in United States v. R. P. Oldham Co., 152 F.Supp. 818, 822 (N.D. Cal. 1957), and in General Electric, 82 F.Supp. at 891. 17/ It has been identified and advocated by several commentators. See, e.g., W. Fugate, Foreign Commerce and the Antitrust Laws 30, 174 (2d ed. 1973); J. Van Cise, Understanding the Antitrust Laws 204 (1973 ed.). See also Report of the Attorney General's National Committee to Study the Antitrust Laws 76 (1955) ("substantial anticompetitive effects");

17/ We note, though, that Swiss Watch and General Electric were there discussing aliens, not American citizens. Oldham said that the existence of a direct and substantial effect satisfied jurisdictional questions, but it did not say that jurisdiction could not be based on other considerations.

Restatement (Second) of Foreign Relations Law of the United States § 18. 18/

18/ Restatement § 18 reads:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

The "direct" and "substantial" requirements come from (b)(ii) and (iii). Comment a to this section specifically indicates, however, that this rule applies only to aliens, since United States citizens may be bound by nationality, and govern only where there has been no

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Other courts have used different expressions, however. See, e.g., Thomsen v. Cayser, 243 U.S. 66, 88, 37 S.Ct. 353, 360, 61 L.Ed. 597 (1917) ("the combination affected the foreign commerce of this country"); Alcoa, 148 F.2d at 444 ("intended to affect imports and exports [and] ... is shown actually to have had some effect on them"); 19/ United States v. Imperial Chemical Industries, Ltd., 100 F.Supp. 504, 592 (S.D.N.Y. 1951) ("a conspiracy ... which affects American

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significant conduct within the United States, since otherwise territorial jurisdiction could be asserted.

19/ This portion of Alcoa referred only to a combination of foreigners, specifically for whom the intent requirement may have been imposed, not American citizens or corporations. Further, Judge Hand's opinion noted that either intent or effect individually might suffice, but that both were present in that case, so that the question did not have to be faced.

commerce"); United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 309 (N.D. Ohio 1949), modified and affirmed, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) ("a direct and influencing effect on trade"). See also citations in 1 J. von Kalinowski, Antitrust Law and Trade Regulations § 5.02[2], at 5-120.

Different standards have been urged by other commentators. Julian von Kalinowski, id. at 5-122, advocates a "direct or substantial" effect test - "any effect that is not both insubstantial and indirect" should support jurisdiction, a view that was adopted by the district court in Occidental Petroleum v. Buttes Gas & Oil Co., 331 F.Supp. 92, 102-03 (C.D. Cal. 1971), affirmed on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). James Rahl turns

away from a flat requirement of effects by concluding that the Sherman Act should reach a restrain either "(1) if it occurs in the course of foreign commerce, or (2) if it substantially affects either foreign or interstate commerce." Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521, 523 (1974). 20/ In essence, as Dean Rahl observes, "[t]here is no agreed black-letter rule articulating the Sherman Act's commerce coverage" in the international context. Id.

Few cases have discussed the nature of the effect required for jurisdiction, perhaps because most of the litigated cases have involved relatively obvious

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20/ Both von Kalinowski and Rahl strive to bring the rule for foreign commerce closer to that for interstate commerce, about which more is said below. See, pp. 612-13 infra.

offenses and rather significant and apparent effects on competition within the United States. Id., P. Areeda, Antitrust Analysis 129 n. 455 (1974). It is probably in part because the standard has not often been put to a real test that it seems so poorly defined. William Fugate, who has identified the "direct and substantial" standard as the rule, has described the meaning of that phrase as being "quite broad". W. Fugate, supra, at 174. What the threshold of significance is, however, has not been identified. 21/ Nor is it quite clear what the "direct-indirect" distinction is

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21/ At least one observer has expressed concern that it might be quite low if economic effects can be aggregated in the manner of Wickard v. Filburn, 317 U.S. 111 (1942). Simson, The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad, 9 J.Int.L. & Econ., 233, 239-40 (1974).

supposed to mean. 22/ It might well be, as was said in the context of transnational securities regulation:

> Although courts have spoken in terms of the Restatement and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconcilation of American and foreign interests in regulating their respective economies and business affairs ....

Note, American Adjudication of Transnational Securities Fraud, 89 Harv.L.Rev. 553, 563 (1976).

Implicit in that observation, as it is in several of the cases and commentaries employing the "effects" test, is the suggestion that factors other than simply the effect on the United States are weighed, and rightly so. As former

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22/ See Simson, supra, at 240-41; Rahl, supra at 524.

Attorney General (then Professor) Katzenbach observed, the effect on American commerce is not, by itself, sufficient information on which to base a decision that the United States is the nation primarily interested in the activity causing the effect. "[A]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for other than for the United States." Katzenbach, Conflicts on an Unruly Horse, 65 Yale L.J. 1087, 1150 (1956).

The effects test by itself is incomplete because it fails to consider other nations' interests. 23/ Nor does it

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23/ See A. Neale, supra at 362-72; Simson, supra at 241-44; Fortenberry, Jurisdiction over Extraterritorial Antitrust Violations, 32 Ohio St.L.J. 519, 521, 534-36 (1971).

expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners. As was observed in Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 131 U.S.App. D.C. 226, 404 F.2d 804, 815 (1968), cert. denied, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969):

> If ... [American antitrust] policy cannot extend to the full sweep of American foreign commerce because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports or imports.

American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances, 24/ even when professing to apply an effects test. 25/ To some degree, the requirement for a "substantial" effect may silently incorporate these additional considerations, with "substantial" as a flexible standard that varies with other factors. The intent requirement suggested by Alcoa, 148 F.2d at 443-44, is one example of an attempt to broaden the court's perspective, as is drawing a

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24/ See W. Fugate, supra, at 70-73.

25/ Indeed, few, if any, opinions have specifically employed the effects test alone or identified it as the sole criterion.

distinction between American citizens and non-citizens. 26/

The failure to articulate these other elements in additional to the standard effects analysis is costly, however, for it is more likely that they will be overlooked or slighted in interpreting past decisions and reaching new ones. Placing emphasis on the qualification that effects be "substantial" is also risky, for the term has a meaning in the interstate antitrust context which does not encompass all the factors relevant to the foreign trade case.

[11, 12] Indeed, that "substantial effects" element of interstate antitrust analysis may well be responsible for the use of an effects test for foreign commerce. The Sherman Act reaches

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26/ See nn. 17-19 supra.

restraints directly intended to limit the flow of interstate trade or whose sole impact is on interstate commerce, but it also reaches "wholly local business restraints" if the particular restraint "substantially and adversely affects interstate commerce." Hospital Building, 425 U.S. at 743, 96 S.Ct. at 1852; Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 95 S.Ct. 392, 42 L.Ed.2d 378 (1974); United States v. Employing Plasterers Assn., 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954). Such a test is necessary in the interstate context to separate the restraints which fall within the federal ambit under the interstate commerce clause from those which, as purely intrastate burdens, remain the province of the states. See, e.g., Bodicker v. Arizona State Dental Health Ass'n, 549 F.2d 626, 629-30 (9th

Cir.); Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 521-24 (9th Cir. 1972), cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.E.2d 1003 (1973). Since, however, no comparable constitutional problems exists in defining the scope of congressional power to regulate foreign commerce, it may be unwise blindly to apply the "substantiality" test to the international setting. See Occidental Petroleum, 331 F.Supp. at 102 n. 13; 1 J. Kalinowski, supra, § 502[2], at 5-121. Only respect for the role of the executive and for international notions of comity and fairness limit that constitutional grant.

[13] A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be some effect - actual or intended - on American foreign

commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws. Occidental Petroleum, 331 F.Supp. at 102-03; Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 191 (1966). Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States - including the magnitude of the effect of American foreign commerce - are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.

[14] It is this final issue which is both obscured by undue reliance on the "substantiality" test and complicated to resolve. An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asseted in a given case as a matter of international comity and fairness. In some cases, the application of the direct and substantial test in the international context might open the door too widely by sanctioning jurisdiction over an action when these considerations would indicate dismissal. At other times, it may fail in the other direction, dismissing a case for which comity and fairness do not require forebearance, thus closing the jurisdictional door too tightly - for the Sherman Act

does reach some restraints which do not have both a direct and substantial effect on the foreign commerce of the United States. A more comprehensive inquiry is necessary. We believe that the field of conflict of laws presents the proper approach, as was suggested, if not specifically employed, in Alcoa in expressing the basic limitation on application of American laws:

> [W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

148 F.2d at 443. The same idea is reflected in Restatement (Second) of Foreign Relations Law of the United States § 40:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon

> the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction 27/

[15, 16] The act of state doctrine discussed earlier demonstrates that the judiciary is sometimes cognizant of the possible foreign implications of its action. Similar awareness should be extended to the general problems of extraterritoriality. Such acuity is especially required in private suits, like this one, for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the

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27/ This section was obviously fashioned with trade regulation problems in mind, for all five illustrations presented in the comment to this section involve such regulation. It also indicates that "jurisdictional" forebearance in the international setting is more a question of comity and fairness than one of national power.

filing of the suit that that consideration has been outweighed. 28/

What we prefer is an evaluation and balancing of the relevant considerations in each case - in the words of Kingman Brewster, a "jurisdictional rule of reason." 29/ Balancing of the foreign

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28/ The risk inherent in such private suits has led one observer to suggest that they be prohibited by statute. Snyder, Foreign Investment and Trade: Extraterritorial Impact of United States Antitrust Law, 6 Va.J.Int.L. 1, 36-37 (1965).

29/ K. Brewster, supra at 446. See similar suggestions in Falk, International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order, 32 Temp.L.Q. 295, 304-06 (1959); Fortenberry, 32 Ohio St.L.J. at 539-45; Simson, 9 J.Int.L. & Econ. at 244-46; Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 Ohio St.L.J. 586, 588 (1961); Zwarensteyn, 3 Am.Bus.L.J. at 170-71 (1965); Comment, International Law: The Act of State Doctrine as a Limitation upon the Extraterritorial Application of United States

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interests involved was the approach taken by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), where the involvement of the Canadian government in the alleged monopolization was held not to require dismissal. The Court stressed that there was no indication that the Canadian authorities approved or would have approved of the monopolization, meaning that the Canadian interest, if any, was slight and was outweighed by the American interest in condemning the

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Antitrust Laws, 21 J.Pub.L. 151, 158-59 (1972); Note, Extraterritorial Application of Federal Antitrust, 20 Vand.L.Rev. 1030, 1056 (1967); Comment, Extraterritorial Application of the Antitrust Laws, 70 Yale L.J. 259, 272-87 (1960). See also Restatement, Second, Conflict of Laws §§ 6, 10, 42, 50.

restraint. 30/ Similarly, in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), the Court used a like approach in declining to apply the Jones Act to a Danish seaman, injured in Havana on a Danish ship, although he had signed onto the ship in New York.

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the

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30/ See supra, pp. 605-606.

foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. 31/ A court evaluating these

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31/ Restatement (Second) of Foreign Relations Law of the United States § 40 states that a court should act

> in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

President (then Professor) Brewster lists these variables:

> (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose

[Footnote Continued On Next Page]

factors should identify the potential degree of conflict if American authority is asserted. A difference in law or policy is one likely sore spot, though one which may not always be present. 32/ Nationality is another; though foreign governments may have some

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to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies, and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. Brewster, supra at 446.

32/ Particularly in the field of trade regulation, American laws may not be duplicated by the other nation. That does not necessarily indicate a "conflict," however, since non-prohibition does not always mean affirmative approval. See P. Areeda, supra at 127.

concern for the treatment of American citizens and business residing there, they primarily care about their own nationals. 33/ Having assessed the conflict, the court should then determine whether in the face of it the contacts and interest of the United States are sufficient to support the exercise of extraterritorial jurisdiction. 34/

33/ Some argue that a defendant's American citizenship might be enough by itself to support jurisdiction. See Restatement (Second) of Foreign Relations Law of the United States § 30.

34/ In requiring district courts to assess the conflicting contacts and interests of those nations involved, we do not thereby assign them the same task which the "act of state" doctrine prohibits them from undertaking. As the quotation from comment d. to § 41 of the Restatement, Second, Foreign Relations Law of the United States (1965), see pp. 607-08, supra, makes clear, there is an important distinction between examining the validity of the "public interests" which are involved in a sovereign policy

[Footnote Continued On Next Page]

[17] We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

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decision amounting to an "act of state" and evaluating the relative "interests" which each state may have "in providing the means of adjudicating disputes or claims that arise within its territory." Our "jurisdictional rule of reason" does not in any way require the court to question the "validity" of "foreign law or policy." Rather, the legitimacy of each nation's interests is assumed. It is merely the relative involvement and concern of each state with the suit at hand that is to be evaluated in determining whether extraterritorial jurisdiction should be exercised by American courts as a matter of comity and fairness.

The district court's judgment found only that the restraint involved in the instant suit did not produce a direct and substantial effect on American foreign commerce. That holding does not satisfy any of these inquiries.

[18-20] The Sherman Act is not limited to trade restraints which have both a direct and substantial effect on our foreign commerce. Timberlane has alleged that the complained of activities were intended to, and did, affect the export of lumber from Honduras to the United States - the flow of United States foreign commerce, and as such they are within the jurisdiction of the federal courts under the Sherman Act. Moreover, the magnitude of the effect alleged would

appear to be sufficient to state a claim. 35/

35/ Our separation in the foreign commerce context between the degree of restraint necessary for establishing subject matter jurisdiction as opposed to that required to state a claim is, of course, not duplicated in the interstate setting, for there a "substantial" restraint is in any event necessary for the establishment of jurisdiction itself. Nevertheless, since the interstate cases provide a standard for both jurisdiction and the statement of a claim, Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 742, n.1, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), they thus offer some guidance for determining the degree of restraint necessary to support a claim for relief in the foreign commerce context as well, see Occidental Petroleum, 331 F.Supp. at 102-03. Although the decision whether the restraint alleged in the instant case qualifies to state a claim is for the district court in the first instance, we note that the quantitative test for substantiality is a "practical, case-by-case economic judgment," not one based on "abstract or mechanistic formulae," Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 523 (9th Cir. 1972), cert. denied, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed.2d 1003 (1973), and that the barrier raised is not very high. See, e.g., Hospital

[Footnote Continued On Next Page]

[21] The comity question is more complicated. From Timberlane's complaint it is evident that there are grounds for concern as to at least a few of the defendants, for some are identified as foreign citizens: Laureano Gutierrez Falla, Michael Casanova and the Casanova firms, of Honduras, and Patrick Byrne, of Canada. Moreover, it is clear that most of the activity took place in Honduras, though the conspiracy may have been directed from San Francisco, and that the most direct economic effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government, nor any comprehensive analysis of the

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Building, 425 U.S. at 743-47, 96 S.Ct. 1848; United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954).

relative connections and interests of Honduras and the United States. Under these circumstances, the dismissal by the district court cannot be sustained on jurisdictional grounds.

We, therefore, vacate the dismissal and remand the Timberlane action.

II. The Smith, Ardon, and Lima Actions

Three employees of Maya in Honduras allege that they were personally injured in the course of the conspirators' harassment of Timberlane and have filed tort suits against the Bank and its corporate parent. Gordon Sloan Smith, a citizen of Canada and a resident of Honduras from 1971 through 1973 and of Miami since, asserts charges of malicious prosecution, abuse of process, and theft of personal property. Miguel Ardon and Jorge Lima are both citizens of Honduras, and both allege claims of malicious

prosecution and abuse of process. Pursuant to local court rules, these suits were reassigned to the same district judge who had handled the Timberlane antitrust action, which by that time had already been dismissed. Shortly thereafter, the court granted the Bank's motion to dismiss the three suits on the ground of forum non conveniens.

[22] Dismissal on the basis of forum non conveniens is within the district court's power. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). The fact that there is no lack of jurisdiction or mistake of venue does not foreclose application of the doctrine; indeed, proper jurisdiction and venue are assumed.

Gulf Oil noted that the decision falls within the discretion of the district court, but observed that "unless

the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id. at 508-09, 67 S.Ct. at 843. The Court also outlined some of the factors, reflecting both the private interests of the litigants and the public interests, to be weighed, a compendium we need not repeat.

[23] Given the circumstances existing at the time of the dismissal, we would be reluctant to say that the district court abused its discretion. The alleged torts took place in Honduras. Most of the witnesses and evidence are apparently based there, as are two of the plaintiffs, and Honduran law would have to applied. The only particular interest of the Northern District of California is that the Bank is headquartered there.

We need not make that decision, however, since the relevant circumstances have changed in the meantime. These three suits were evaluated by the district court after the Timberlane action had already been dropped. That action having been revived and remanded, it may be convenient and more efficient for the same court to hear these suits. We do not make that determination ourselves, but we believe that the circumstances have changed sufficiently to justify vacating the dismissals and remanding these cases to the district court for a fresh consideration

Vacated and remanded.

Appendix "E"

Statutory Provisions Involved

Sherman Act, 15 U.S.C. § 1:

Trusts, etc., In Restraint of Trade Illegal; Penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years,

or by both said punishments, in the discretion of the court.

Sherman Act, U.S.C. § 2:

Monopolizing Trade a Felony; Penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Wilson Tariff Act, U.S.C. 15 § 8:

Trusts in Restraint of Import Trade Illegal; Penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters

or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

AFFIDAVIT OF SERVICE BY MAIL

State of California)
) ss.
City and County of San Francisco)

Lisa Wallace, being first duly sworn upon oath, deposes and says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 862 Folsom Street, San Francisco, California 94107; that affiant served three (3) true and correct copies of the attached **Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit** on the following person, by placing same in an envelope addressed as follows:

William L. Edlund, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94120

that said envelope was then, on May 7, 1985, sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States Mail at the place so addressed, or that there is regular

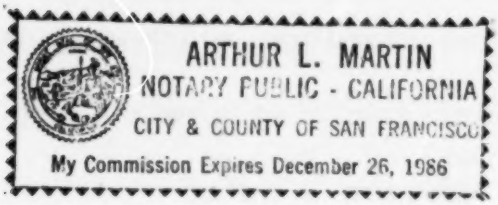
communication by mail between the place of mailing and the place so addressed.

Lisa Ballard

Subscribed and sworn to before me this 7th day of May, 1985

Arthur L. Martin

Notary Public in and for the City and County of San Francisco, State of California



MAY 31 1985

ALEXANDER L. STEVAS,
CLERK

No. 84-1761

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE TIMBERLANE LUMBER COMPANY, DANLI INDUSTRIAL, S.A., MAYA LUMBER COMPANY, S. de R.L., JORGE LIMA, MIGUEL ARDON, and GORDON SLOAN SMITH,
Petitioners,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, BANKAMERICA CORPORATION, PEDRO CASANOVA e HIJOS, S.A., IMPORTADORE MAYORISTA, S. de R.L., MICHEL CASANOVA, NASSER BONHEUR, MANUEL RUIS, LUIS PASMINO, HENRY MALATESTA, JOSE GONZALES, and PATRICK BYRNE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

1. Should this Court review the decision below, which, consistent with the reasoning of this Court and with decisions of the Courts of Appeals, correctly determined that, where there is great potential for conflict with the economic policy and commercial law of a friendly sovereign State and the effect on U.S. foreign commerce is minimal, the Federal court should not exercise jurisdiction over a putative antitrust claim?*

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*Bank of America National Trust and Savings Association is a wholly owned subsidiary of BankAmerica Corporation.

BankAmerica Corporation owns, directly or indirectly, more than 50 percent but less than 100 percent of the voting stock of the following:

Banca d'America e Italia
BancAmerica Options, Inc.
BA Australia Limited
Bamerical Investments (Australia) Limited
Bamerical Nominees (Australia) Proprietary Ltd.
BA Oil and Gas Management Ltd.
BA (Australia) Holding Proprietary, Ltd.
BA Investors Mgt. Ltd.
BA Australia Leasing Ltd.
Bamerical Proprietary Ltd.
BA (Australia) Hong Kong Ltd.
Bank of America Cameroon

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No. 84-1761

In the Supreme Court

OF THE

United States

THE TIMBERLANE LUMBER COMPANY, DANLI INDUSTRIAL, S.A., MAYA LUMBER COMPANY, S. de R.L., JORGE LIMA, MIGUEL ARDON, and GORDON SLOAN SMITH,
Petitioners,

VS.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, BANKAMERICA CORPORATION, PEDRO CASANOVA e HIJOS, S.A., IMPORTADORE MAYORISTA, S. de R.L., MICHEL CASANOVA, NASSER BONHEUR, MANUEL RUIS, LUIS PASMINO, HENRY MALATESTA, JOSE GONZALES, and PATRICK BYRNE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners have not set forth a single ground for the granting of certiorari which merits serious consideration. The balancing test for exercising jurisdiction applied by the court below is consistent with the reasoning of this Court and the Courts of Appeals, and has been approved by each Court of Appeals that has considered the question. Thus, no conflict exists.

Further, the balancing approach employed below has received approval by the Legislative and Executive branches of Government. Not only have the Department of

Justice, the Federal Trade Commission and the Department of State endorsed the approach, but also Congress, in amending the Sherman Act in 1982, expressly approved what the court below did here: "employ notions of comity or otherwise . . . take account of the international character of the transaction" (H.R.Rep. 97-686, 97th Cong., 2d Sess. (1982), p. 13). In short, no reason for review exists.

STATEMENT OF THE CASE

Petitioners' statement of the case ignores the evidence and merely repeats the unsupported allegations made by petitioners for more than 12 years. The relevant *facts*, however, are largely undisputed, and are summarized in the 1983 opinion of the district court (Petn.Appx. C-1-87) and the 1984 opinion of the Court of Appeals (Petn.Appx. B-1-35).[1] They are as follows.

In 1971, petitioner Timberlane Lumber Company ("Timberlane") formed two Honduran companies (petitioners Maya Lumber Company, S. de R.L. ("Maya") and Danli Industrial, S.A.) as investment vehicles with respect to the Honduran lumber business (Petn.Appx. C-6-7). Maya was organized to purchase assets of another Honduran lumber company, Lima e Hijos, S.A. (the "Lima company"), which was not operating because of liquidity and management problems (Petn.Appx. C-5).

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[1] In 1977, the Court of Appeals remanded the action for discovery and further findings (*Timberlane Lumber* v. *Bank of America* (9 Cir. 1977) 549 F.2d 597 (*"Timberlane I"*), Petn.Appx. D-10-14). Thereafter, the courts below applied a "rigorous standard" of proof to respondents' jurisdictional challenge (see *Timberlane Lumber* v. *Bank of America* (N.D.Cal. 1983) 574 F.Supp. 1453 (*"Timberlane II"*), Petn.Appx. C-25 n. 24; *Timberlane Lumber* v. *Bank of America* (9 Cir. 1984) ..... F.2d ..... (*"Timberlane III"*), Petn.Appx. B-17 n.2) Many of the facts in the record are admissions of petitioners on tape recordings they made of their own conversations.

The Honduran branch of respondent Bank of America National Trust and Savings Association (the "Bank") had been one of the Lima company's secured lenders. When the Lima company ceased operations, it owed the branch a substantial debt which was secured by a *hipoteca de empresa,* an all-inclusive Honduran mortgage (Petn. Appx. C-10). As the result of Honduran foreclosure proceedings filed by creditors of the Lima company (including other banks), a judicial decree was issued that the Lima company assets be sold at public auction to satisfy the creditors' claims (Petn.Appx. C-14). No such auction was held, however; the assets were surreptitiously conveyed to Maya (ibid.).[2]

Honduran counsel advised the Bank's Honduras branch that Maya's title to the Lima company assets was defective and that the Bank's *hipoteca de empresa* still encumbered the Lima company assets in Maya's custody. A collection effort was undertaken, and the Bank caused its security interest to be assigned to a local collection agent (Petn. Appx. C-17-18). The ensuing judicial proceedings in Honduras were protracted. Ultimately, the assets were sold at a judicial auction. A final and complete settlement of the Honduran litigation was reached in 1977 (Petn.Appx. C-24).

Unsuccessful in their efforts to defeat the creditors' rights actions against Maya in Honduras, petitioners filed an action in U.S. District Court, alleging that the conduct of the Bank's Honduran branch and others in Honduras aborted petitioners' plans to mill lumber in Honduras and export it to the United States, in violation of the U.S.

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[2]Maya's manager was heard on tape to urge that petitioners "snake" the Lima company assets out from under the legitimate Honduran creditors. The objective was to defraud those creditors, and contemporaneous documents spoke of petitioners' plan to obtain the $2 million worth of Lima company assets "for a song."

antitrust laws. In 1974, the district court granted a motion to dismiss and entered judgment on the ground, inter alia, that there was "no direct and substantial effect on United States foreign commerce" (Appendix A hereto).[3] On appeal, the Ninth Circuit ruled in *Timberlane I* that a simple "effects" test was inadequate in international cases because it failed to take into account possible adverse consequences for American foreign policy, and vacated the first judgment (Petn.Appx. D-42-77).

On remand, the district court found that, even assuming the truth of petitioners' allegations about the quantity of commerce affected, there was no more than a *de minimis* effect on foreign commerce (Petn.Appx. C-78-79; also see id. at pp. C-62-63 ("infinitesimally small quantity")). Its holding, however, was based on additional factors. In particular, the government of Honduras had issue a Diplomatic Note, expressing

> "the concern which has been caused to the Government of Honduras in that there is being litigated in a court of the United States, on the basis of a North American law which not only is inapplicable in Honduras but is contrary to the principles of local legislation, a case which has already been decided in legal form by the courts of the Republic with reference to activities

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[3]While that judgment was on appeal, related (but not consolidated) tort actions were filed by Maya and Danli managers, petitioners Ardon, Lima and Smith, but dismissed on grounds of forum non conveniens. Those dismissals were vacated in *Timberlane I*, reinstated by the district court on remand and affirmed in the Court of Appeals 1984 opinion. Petitioners do not seek certiorari as to the related Federal tort actions (see generally Petn.).

In 1975, petitioners filed an action in the California state courts based on the same conduct. After some discovery, that action was dismissed on grounds of forum non conveniens and affirmed on appeal in an unreported opinion. The California Supreme Court denied a hearing and petitioners did not seek certiorari of that decision.

> carried on under its jurisdiction and which affects a Honduran natural resource, that is timber, which is by law under the control and oversight of the government of the nation itself" (CR: 343, Exh. 5).

The court found potential for "needless tensions" with Honduras (Petn.Appx. C-83), and ruled:

> "Regard for the codification of [Honduras'] cultural, business and ethical mores, as well as the integrity of its system of justice leads us inextricably to conclude that we need DISMISS these actions" (Petn.Appx. C-87).

The Court of Appeals affirmed (Petn.Appx. B). It too found that the "actual effect of Timberlane's potential operations on United States foreign commerce" was "insubstantial, even in the narrow pine lumber market" (Petn. Appx. B-30; also see id., p. B-29 ("miniscule effect")). Moreover, the record failed to reveal either intent to affect foreign commerce or foreseeability of such effect:

> ". . . Bank of America's acts were directed primarily toward securing a greater return on its investment. Its actions were consistent with Honduran customs and practices. . . .
>
> • • •
>
> ". . . Bank of America simply enforced its mortgage in an attempt to recoup its investment. . . . We do not believe that a reasonable investor would have foreseen the minimal effect that has occurred here" (Petn.Appx. B-31-32).

The Court of Appeals was also concerned about a "significant conflict with Honduran law and policy" (Petn.Appx. B-26; also see id., p. B-33), and, for all these reasons, affirmed. On February 1, 1985, the Court of Appeals denied a petition for rehearing (Petn.Appx. A).

ARGUMENT

The ruling below is wholly consistent with the reasoning of the decisions of this Court and the Courts of Appeals.

The Court of Appeals in *Timberlane I* correctly set forth criteria which, in international antitrust cases, allow the district court to evaluate serious concerns expressed by foreign governments:

> "A tripartite analysis seems to be indicated. . . . [T]he antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws. . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority" (Petn.Appx. D-62-63; citations omitted).

As the Court of Appeals explained, this kind of balancing "is especially required in private suits [because] . . . there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed" (Petn.Appx. D-66-67). This procedure provides a safety valve for the rare case, like this one, which has the potential for creating a serious, and needless, diplomatic rift with a friendly sovereign. No Court of Appeals that has considered the desirability of applying such balancing in similar circumstances has opposed it. To the contrary,

at least four other circuits (and district courts in a fifth) have concluded that such balancing provides a useful and appropriate framework.

I

THE RESULT IN THIS CASE IS CONSISTENT WITH THE REASONING OF THIS COURT'S PRECEDENTS AND WITH DECISIONS FROM THE COURTS OF APPEALS.

Petitioners' action was dismissed on jurisdictional grounds because, on balance, there was insufficient nexus to the United States (as compared to Honduras) and a serious potential for conflict with the government of Honduras. After several years of full discovery, petitioners were unable to show any intended effect, any reasonably foreseeable effect, or anything more than a *de minimis* actual effect on U.S. foreign commerce. Moreover, the conduct giving rise to the alleged claims and all the substantial effects occurred in Honduras. Petitioners are unable to cite one case in which jurisdiction has been exercised in such circumstances, and there is none.

The decisions of this Court establish that concerns about foreign policy implications require there be some limits on the exercise of Sherman Act jurisdiction in foreign commerce cases. This Court first noted in *American Banana Co.* v. *United Fruit Co.* (1909) 213 U.S. 347, that it was "surprising to hear it argued" that the Sherman Act governed acts outside the United States (id. at 355). Subsequent cases have held that, with limitations, extraterritorial conduct could be subject to Sherman Act scrutiny, i.e., where the alleged conspiracy is hatched in the United States and there are effects on U.S. commerce (see *Continental Co.* v. *Union Carbide* (1962) 370 U.S. 690, 704-706).[4]

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[4]Here, the district court found "no evidence linking the home office of the Bank to any anticompetitive scheme" (Petn.Appx. C-64).

For many years, Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416 has also been recognized as a leading statement of applicable principles. That decision held that Sherman Act jurisdiction was appropriate where defendants' foreign conduct both was intended to and did cause substantial effects in the United States (148 F.2d 443-445). (Petitioners have failed in 12 years of litigation to make such a showing.) In so holding, however, the *Alcoa* court recognized that foreign policy considerations impose limitations on cases alleging Sherman Act jurisdiction for conduct abroad. In particular, the *Alcoa* court hypothesized an agreement abroad which (as the courts found in this case) was not intended to affect U.S. imports, but which might have some repercussions in the United States and concluded:

> "[W]hen one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them" (148 F.2d 443).

Potential international complications have been acknowledged by this Court and led the Court of Appeals to conclude in *Timberlane I* that jurisdictional rulings in foreign commerce cases require delicate handling.[5]

Contrary to petitioners' suggestion in their third question for review, *Timberlane I* does not give the district courts

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[5]Compare the citations of secondary authorities Fugate and Brewster cited in *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 705, with those cited in *Timberlane I*, Petn.Appx. D-42, n. 12, et seq. The *Timberlane I* court expressly relied upon *Continental Co.* v. *Union Carbide* (Petn.Appx. D-67-68).

"unbridled discretion" to abstain.[6] Rather, the district court balances the relevant criteria and national interests, and its decision is subject to plenary review by the Court of Appeals.[7]

Each circuit that has considered balancing national in-

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[6]Cf. *Timberlane III*, Petn.Appx. B-18-19 & n. 3; *Industrial Inv. Development Corp.* v. *Mitsui & Co.* (5 Cir. 1982) 671 F.2d 876, 884-885, n. 7, vacated on other grounds (1983) 460 U.S. 1007, holding reinstated (5 Cir. 1983) 704 F.2d 785, certiorari denied (1983) ..... U.S. ....., 104 S.Ct. 394).

[7]Petitioners argue that the *Timberlane* test is "completely inappropriate," citing a law review article by James M. Grippando (Petn., p. 45), which was written before *Timberlane II or Timberlane III*. Mr. Grippando's primary concern is that foreign remedies may not include treble damages. This is precisely the source of much international conflict over the jurisdictional reach of the Sherman Act. More important, however Mr. Grippando argues *for* "interest balancing embodied in the judicial abstention tests" because it "better accommodates sensitive foreign relations concerns than does the traditional [simple] effects doctrine" (Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine, 23 Va.J.Int'l L. (1983) 395, 428). But he urges interest balancing under a "choice of law" approach. Mr. Grippando's distinction is therefore one of form, not substance (cf. id., p. 423 ("functionally similar")), and would have made no difference in application in this case (see Petn.Appx. C-80-83 (district court findings on availability and adequacy of alternative forum)). Finally, Mr. Grippando notes that where "the balance of relative national interests tip against the United States," as the Court of Appeals here held (Petn.Appx. B-33-34), "federal regulatory statutes should not receive extraterritorial application" (23 Va.J.Int'l L. 428 n. 167). In short, Mr. Grippando's analysis supports respondents, not petitioners.

terests in determining Sherman Act jurisdiction over foreign commerce cases has endorsed the concept:[8]

- In *Montreal Trading Ltd.* v. *Amax Inc.* (1981) 661 F.2d 864, 869, the Tenth Circuit held that *Timberlane I* "contains the proper elements for consideration";
- In *Mannington Mills, Inc.* v. *Congoleum Corp.* (1979) 595 F.2d 1287, 1297-1298, the Third Circuit adopted a similar balancing test;
- In *In re Uranium Antitrust Litigation* (1980) 617 F.2d 1248, 1255, the Seventh Circuit said the balancing test "certainly provide[s] an adequate framework for such a [jurisdictional] determination";[9] and
- In *Industrial Inv. Development Corp.* v. *Mitsui & Co.* (1982) 671 F.2d 876, 884 n. 7, vacated on other grounds (1983) 460 U.S. 1007, holding reinstated

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[8]In addition, several district courts in the Second Circuit have invoked *Timberlane I* principles (*Dominicus Americana Bohio* v. *Gulf & Western* (S.D.N.Y. 1979) 473 F.Supp. 680, 687 ("proper standard is a balancing test"); *National Bank of Canada* v. *Interbank Card Ass'n* (S.D.N.Y. 1980) 507 F.Supp. 1113, 1119 ("parties are in agreement that the applicable criteria are provided by [*Timberlane I*]"); *Power East Ltd.* v. *Transamerica Delaval, Inc.* (S.D.N.Y. 1983) 558 F.Supp. 47, 49 ("see" cite)). On appeal from the dismissal in the *National Bank* case, the Second Circuit affirmed on the basis that there was no anticompetitive effect on U.S. foreign commerce (*Nat. Bank of Canada* v. *Interbank Card Ass'n* (2 Cir. 1981) 666 F.2d 6, 8 ("[w]ithout questioning the pertinence of the third [balancing] test identified in *Timberlane*")). See also *Bulk Oil (Zug) A.G.* v. *Sun Company, Inc.* (S.D.N.Y. 1983) ..... F.Supp. ....., n. 4 (available on LEXIS, Genfed).

[9]The *Uranium* decision did not involve a specific challenge to jurisdiction. Rather, the defendants did not appear and defaulted, making sensible balancing difficult if not impossible (see J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d Ed. 1981) p. 173)). In those circumstances, the Seventh Circuit declined to find that the trial court had abused its discretion by not balancing national interests (617 F.2d 1256).

(5 Cir. 1983) 704 F.2d 785, certiorari denied (1983) ..... U.S. ....., 104 S.Ct. 394, the Fifth Circuit "commend[ed]" the analysis in *Timberlane* and *Mannington Mills*. But, the court concluded, the *Mitsui* defendants had set forth "a series of mere assertions, unsupported by the pleadings or by summary judgment evidence" (671 F.2d 885), which failed to satisfy the *Timberlane* test.

Petitioners' argument that the different results in *Mitsui* and *Timberlane* justify review by this Court (Petn., pp. 44-47) is erroneous. The different records compelled the different appellate treatments under the same legal standard.[10] In contrast to *Mitsui*, the record here contains abundant evidence of the potential conflict with foreign (Honduran) law. This was one of the matters of concern expressed by the Honduran government in its Diplomatic Note (see p. 5, supra), and recognized by the district court (see Petn.Appx. C-53-54 n. 31, C-75-85). That conflict was also forcefully stated in the opinion of a leading comparativist, Eduardo White (which was paraphrased in the Court of Appeals decision, see Petn.Appx. B-24-25):

"[C]ertain practices restricting competition and obviously condemned by the United States antitrust laws,

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[10]This difference is underscored by petitioners' own synopsis of the cases (Petn., pp. 46-47):

"In *Timberlane* the court found that the 'enforcement of United States antitrust laws in this case would lead to a significant conflict with Honduran law and policy' [*Timberlane III*, 749 F.2d 1384] while in *Mitsui* the court said that neither the Indonesian court's nullification of [plaintiffs'] joint venture agreement with Telaga Mas nor the Indonesian government's action in cancelling its approval of [plaintiffs'] joint venture . . . has been shown to have been [an] approval of defendants' efforts to destroy the joint venture agreement . . .' 671 F.2d at 885."

> are accepted and even encouraged by the economic environment and legal organization of Honduras. . . .
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> "[M]y opinion is that the enforcement of the United States antitrust laws to business activities in Honduras clearly would be contrary to the principles and rules of Honduras and would be considered under the legislation of that country to be an unjustified intrusion into those activities" (CR:292, paragraphs 11, 17).

Contrary to petitioners' contention (see Petn., pp. 33-41), this case, as the district court noted, is "easily distinguishable" from the district court order which was affirmed in *Laker Airways* v. *Sabena, Belgian World Airlines* (D.C. Cir. 1984) 731 F.2d 909 (Petn.Appx. C-45 n. 28). In *Laker*, jurisdiction over the Sherman Act claims was "beyond dispute" (731 F.2d 925) given the conduct which occurred in the United States and the magnitude of the adverse effects the alleged conspiracy had on U.S. consumers and U.S.-based creditors (731 F.2d 923-925). The sole issue was whether a foreign court could enjoin prosecution of ongoing United States litigation and thereby supersede the conceded subject matter jurisdiction of the Federal court (731 F.2d 920-921). In that context, the *Laker* majority rejected defendants' argument that principles of comity required the Federal court to defer to the foreign court's injunction, and to dissolve a U.S. antisuit injunction, because the "foreign act [to which deference was requested] is inherently inconsistent with the policies underlying comity" (731 F.2d 937).

Thus, *Laker* and *Timberlane* are consistent, and do not, as petitioners now argue (Petn., pp. 33-41), create a conflict warranting review by this Court.[11] This is borne

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[11]Petitioners did not even refer to the decision of the District of Columbia Court of Appeals when they petitioned for rehearing from *Timberlane III*, although *Laker* had been decided some ten

out by the *Laker* court's explanation that:

> "[I]f the anticompetitive aspect of the alleged injury is not appreciable; the contacts with the United States are attenuated; and the actions of foreign governments denote the existence of strong foreign interests [—the very circumstances of *Timberlane*—], then comity may suggest a lack of Congressional intent to regulate the alleged conduct. In this context, comity may have a strong bearing on whether application of the United States antitrust laws should go forward" (731 F.2d 938).

II

THE EXECUTIVE BRANCH HAS ENDORSED THE TIMBERLANE APPROACH AND LEGISLATIVE HISTORY OF THE 1982 AMENDMENTS TO THE SHERMAN ACT ESTABLISHES LEGISLATIVE INTENT TO PERMIT COURTS TO EMPLOY COMITY.

The *Timberlane* approach to foreign commerce Sherman Act cases has received strong endorsements from the U.S. Department of Justice, the Federal Trade Commission and the U.S. Department of State.[12]

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months earlier. Petitioners' argument (Petn., p. 40) is borrowed from a newspaper article by two lawyers who confuse the *Laker* defendants' comity argument (which was rejected) with the court's holding on subject matter jurisdiction. Moreover, their attack on the application of *Timberlane's* jurisdictional rule of reason is based on two erroneous statements: (1) that the *Timberlane* conclusions about the effect on commerce rested on a resolution of conflicting evidence when in fact they were based on the assumed truth of petitioners' assertions, and (2) that discovery on remand was limited to the jurisdictional issue. Their conclusions are therefore entitled to no weight.

[12]E.g., Antitrust Division, United States Dept. of Justice, Antitrust Guide for International Operations (1977), pp. 6-7; Statement of William F. Baxter Before House Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, November 19, 1981; Shenefield, The Perspective of the U.S. Department of Justice, in

Likewise, Congress has manifested its approval of *Timberlane*. In 1982, Congress enacted section 7 of the Sherman Act (15 U.S.C. § 6a), limiting jurisdiction to export claims having "direct, substantial and reasonably foreseeable effect" on U.S. foreign commerce.[13] How the amendment will affect future cases is not entirely clear. But the legislative history of the amendment demonstrates that Congress recognized the importance of the courts' applying the rules of comity:

> "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have

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Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws," (J. Griffin, Ed. 1979) 12, 22-24; Remarks of John H. Shenefield, "Extraterritorial Impact of U.S. Antitrust Laws," before the ABA Section of International Law (Aug. 9, 1978), reprinted in CCH Trade Reg.Rptr., Current Comment Transfer Binder, ¶ 50,386, at p. 55,857; Remarks by John H. Shenefield, International Law Institute and the International Law Section of the American Bar Association (Dec. 10, 1980) reprinted in CCH Trade Reg.Rptr., Current Comment Transfer Binder, ¶ 50,424, at p. 55,959; Remarks by Alexander W. Sierck, Director of Trade Policy, Antitrust Division, World Trade Institute, New York (Sept. 6, 1979), p. 9; W. F. Baxter, Responses to Questions Submitted by the Committee on the Judiciary (March 23, 1981), pp. 15-16 ("I agree with the trend of recent case law which acknowledges the need for United States courts to consider and weigh foreign interests before asserting jurisdiction in antitrust cases involving conduct beyond our borders"); Remarks of Commissioner Robert Pitofsky, The Bar Association of Greater Cleveland, Antitrust Compliance Seminar (April 28, 1981), pp. 7-8 ("I think the *Timberlane* approach is right.").

As for the Department of State, see, e.g., Letter of J. Brian Atwood, Assistant Secretary of State, to Senator Edward M. Kennedy, Chairman of the Senate Committee on the Judiciary (Sept. 27, 1979), reprinted in S.Rep. No. 444, 96th Cong., 1st Sess. (1979), 118; see Letter of Roberts B. Owen, Legal Adviser of the Department of State, to John H. Shenefield, Associate Attorney General (March 17, 1980), reprinted in 74 Am.J.Int'l.L. (1980) 665.

[13]The text of the statute is set forth in the statutory appendix (Appendix B hereto).

> no effect on the courts' ability to employ notions of comity or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist . . ." (H.R.Rep. 97-686, 97th Cong., 2d Sess. (1982), p. 13).

See also *Laker Airways* v. *Sabena, Belgian World Airlines,* supra, 731 F.2d 946 n. 137. Thus, Congress has said that it is appropriate for the courts to apply the *Timberlane* approach in cases like this one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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(Appendices follow)

APPENDIX A

United States District Court for the
Northern District of California
No. C-73-0792 L.H.B.
Civil

The Timberlane Lumber Company, an Oregon
Partnership; Danli Industrial, S.A.,
a Honduras corporation;
Maya Lumber Company, S. de R.L.,
a Honduras corporation,
Plaintiffs,

vs.

Bank of America National Trust and Savings
Association, a National banking association;
Bankamerica Corporation, a California corporation;
Pedro Casanova E Hijos, S.A.,
a Honduras corporation;
Importadore Mayorista, S. de R.L.,
a Honduras corporation;
Michel Casanova; Nasser Bonheur, Manuel Ruis;
Louis Pasmino; Henry Malitesta; Jose Gonzales;
Patrick Byrne; and Does I to X Inclusive,
Defendants.

[Filed Mar. 20, 1974]

JUDGMENT

Defendants' motion to dismiss came on for hearing before this Court, the Honorable Lloyd H. Burke presiding, and the matter having been submitted by the parties for decision, and a decision having been duly rendered and announced by the Court at the hearing,

The Court having concluded that it is prohibited under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce,

It is hereby ORDERED, and ADJUDGED that plaintiffs take nothing and that the action be dismissed on the merits. Each party will bear its own costs.

Dated: March 20, 1974

LLOYD H. BURKE

United States District Judge

APPENDIX B

SHERMAN ACT, § 7 (15 U.S.C. § 6a)

Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.